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Construction of 'Survival Act' and 'Death Act' in Michigan

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CONSTRUCTION OF "SURVIVAL ACT" AND "DEATH ACT" IN MICHIGAN.

SECTION 10,117 of 3 Miller's Compiled Laws 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, and trover, actions of assault and battery, false imprisonment, for goods taken and carried away, for negligent injury to persons, for damage done to real and personal estate, and actions to recover real estate where persons have been induced to part with the same through fraudulent representations and deceit."

It is known as the "Survival Act" and has been in force since 1838, with the exception of the part relating to actions to recover real estate and the words, "for negligent injuries to persons." The latter were inserted in 1885.

Section 10,427 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, 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."

It is known as the "Death Act." It was enacted in 1848, amended in 1873, and follows closely Lord Campbell's Act.

In the construction of these acts, troublesome questions have arisen, difficulties have been encountered, different theories urged, different views entertained, different conclusions reached, and different opinions rendered, respecting the number of actions that can be maintained under them, the circumstances that invoke one rather than the other, the measure of damages applicable, respectively, and certain questions of practice as to the joinder of counts and the amendment of pleadings. The statement would hardly be justified that all these questions have finally been settled in this state; some of them undoubtedly are closed; others perhaps remain open. The cases are numerous, but the limits of this article allow reference to a few of them only.

Among the cases as to the number of actions that can be maintained, that of *Sweetland* v. *Chicago & Grand Trunk Railway Co.*,[1] and that of *Dolson* v. *Lake Shore & Michigan Southern Railway Co.*[2] are leading ones. In the *Sweetland* case the declaration contained a count upon the Survival Act and one upon the Death Act. In the court below plaintiff recovered upon the former and the defendant upon the latter, and a writ of error was taken. Four opinions were rendered in the Supreme Court. Three of the judges were of the opinion that these acts did not give two rights of action for the same injury resulting in death. One of them was of the opinion that they contemplated two separate and distinct remedies, both of which might, under proper circumstances, be enforced; and one of them was of the opinion that under the record it was not necessary to pass upon this question.

In support of the view that these acts did not provide a double remedy where death resulted from the wrongful act, it was said in substance: That inasmuch as, until the amendment of 1885 of the Survival Act, no suit could be maintained in this state after the death of the injured person for the pain and suffering arising from negligent injuries, it was not the intention of the legislature, under that act, to give a right of action for the benefit of the estate in case of death from an injury, and also to allow the heirs to recover under the Death Act for their pecuniary loss; that the fact that the Survival Act was for the benefit of the decedent's estate and the Death Act for the benefit of the decedent's heirs could make no difference in the construction placed upon these acts; that it was not the intention of the legislature to provide a double remedy; that the Death Act was passed subsequent to the Survival Act and was intended to give the only remedy where death resulted from the wrongful act; that, inasmuch as it was generally held that judgment recovered or settlement made by the injured party in his lifetime was a bar to recovery by the heirs under the Death Act, it followed that a judgment by the heirs under the Survival Act would bar the right to recover under the Death Act; that it had not been the understanding of courts and law-writers that such statutes were intended to create two rights of action for the same wrongful act; that while repeals by implication were not favored, there was no such repugnance here that both acts could not stand; that it was plain from the terms of the statutes that the Survival Act applied to cases where death results from other causes than the wrongful injury; that in other jurisdictions similar statutes were held not to

[1] Sweetland v. Chicago & Grand Trunk Railway Co., 117 Mich. 329.
[2] Dolson v. Lake Shore & Michigan Southern Railway Co., 128 Mich. 444.

give a dual remedy; that as far as it could be ascertained, it had never before been claimed in this state that a cause of action survived for a negligent injury or for an assault and battery where death results from the wrongful act, notwithstanding both acts had been on the statute books for more than fifty years and the amendment for negligent injuries for over twelve years; that the profession in this state understood that two actions would not lie for the same wrongful act; that the legislative intent in passing the amendment of 1885 was apparent from the history of the cases in this state; that prior to 1885, if the party negligently injured brought suit for damages, and died during its pendency from some cause other than the negligent injury, the suit immediately abated, and no right of action accrued under the Death Act, and this because death was not the result of the wrongful act or omission; that since the Death Act was enacted actions could be maintained under it, when death resulted from the wrongful act, and therefore it was not necessary to provide by amendment for a right of action where death resulted from the wrongful act as that right already existed; that the purpose of the amendment of the Survival Act in 1885 was to provide a remedy when one was lost by the death of the party; that the only logical construction was that the Death Act applied to cases of death caused by wrongful injuries and the Survival Act to cases where the injury did not cause death; that had both acts been enacted at the same time, in different sections of the same act there would have been no room for the contention that the Survival Act applied to injuries resulting in death, that in that case, as now, both sections would have to be reconciled and the legislative intent of the Survival provision in reference to injuries causing death would still have been open and the illogical result of holding that the Survival provision was intended to cover cases of wrongful killing would have forced the conclusion that the legislature intended the Survival provision should apply only to personal injuries not causing death; that the result would not be changed if we started with the Survival Act as in existence when the Death Act was passed, as we should then have an act which provided for the survival of actions for personal injuries, followed by another giving a right of action for personal injuries resulting in death, and that it could not be contended that the Survival Act conferred a right of action for wrongful killing, as more definite and specific language indicative of the legislative purpose would be necessary; that the only logical construction and that given by most of the cases was that the Survival Act applies to cases of negligent injuries to the person that are not fatal, and the Death Act applies

to fatal cases; that, if rights of action existed under both statutes when death was not instantaneous there would seem no good reason for holding that recovery of judgment by the injured party should be a bar to an action under the Death Act for his subsequent death, as recovery in such case is permitted, not upon the injury sustained by the deceased, but upon the pecuniary injury to the survivors occasioned by his death, yet courts generally, and in accordance with the legislative intention, so hold; that, had the intention been otherwise, the act would probably have permitted each survivor to bring and prosecute his own action for his own benefit, instead of requiring it to be brought by the personal representative and providing for a distribution.

In favor of the view that these acts contemplated, under proper circumstances, a double remedy, it was said in substance: That the history of the legislation and the legislative intent gathered therefrom favored it; that as early as 1882 it had been held that the Survival Act was intended to provide for the survival of the cause of action, otherwise there would be force in the contention that it was intended to apply to pending actions and to provide for the revival of the action when commenced by the deceased in his lifetime; that when the amendment of 1885 was added to the Survival Act the latter already had a judicial construction, and that it was fair to assume that the amendment was made in view of this construction and that the legislative intent was to provide for the survival of the cause of action in the cases specified, the right to recover from injuries from negligence being placed, by the amendment, on the same plane as the causes of action enumerated in the section before the amendment; that in the case of injuries causing death a recovery for damages prior to the death of the injured party could have been had before the enactment of the Death Act, and any other conclusion would render the legislative intent absurd; that repeals by implication were not favored; that it was not the legislative intent that the Death Act should be a substitute for the Survival Act in all cases in which death ensued, although there were some considerations favoring the view that such was the intent, namely, that it should not be lightly inferred that two remedies were given for the same evil, and that the Death Act was apparently broad enough to cover all cases in which death results from the wrongful act of another; that the remedies were distinct and different; that the right of the personal representative to recover under the Survival Act for injuries sustained by his decedent during his life-time, notwithstanding his death, and the limitation upon recovery under the Death Act to the pecuniary loss *resulting from such*

death to the persons who may be entitled to such damages when recovered, make it clear that the Death Act does not cover the whole ground as, for instance, in those cases in which no pecuniary loss can be shown *resulting from the death* no recovery can be had under the Death Act although the deceased would have been entitled to substantial damages if he had taken action in his lifetime, and notwithstanding the express provision of the Survival Act that his cause of action shall survive; that the view that a settlement or recovery by the injured party in his lifetime is a bar to an action by his personal representative is of equal force to show that the remedy under the Death Act is not exclusive as it is to show that the double remedy does not exist; that the terms of the Death Act itself show that such settlement or such recovery would be a bar, for it is only where the injured party himself would, had death not ensued, been entitled to maintain an action, that the remedy is given to the widow or next of kin, and of course, he would not *so* have been entitled at the time of his death if he had already recovered or settled for the injury; that the fact that under the Death Act no recovery can be had for pain and suffering preceding death, nor for any damages resulting to the injured party which precedes death, nor at all, unless *in addition* to the injury and the *resulting death,* a direct pecuniary loss is shown to have resulted to some one or more of those who take of the estate of the injured party under the statute of distribution, shows that this act does not continue the right in all cases; that the previous decisions of this court favored it; that it was supported by the decisions upon similar statutes in other states as shown by a carefully prepared series of articles; that in two of the states in which the existence of the double remedy was denied, the reasoning of the courts did not answer those given here, but on the contrary, in one of the leading cases supported the conclusion in favor of the double remedy, and in another of these states, the authority was weakened by the fact that a very able judge who was a member of the court when the decision was rendered had since, in another case, expressed doubts as to its correctness; that the difficulty in the construction of these statutes had been aggravated by any attempt to depart from the letter of the statutes themselves.

The practical result in the *Sweetland* case was a reversal of the judgment of the court below upon the count based upon the Survival Act, two of the judges dissenting.

In the *Dolson* case, the declaration contained two counts, one under the Survival Act and one under the Death Act. In the court below the plaintiff recovered on each count, and the defendant

brought error. One of the principal questions submitted to the Supreme Court in this case was: Whether, if plaintiff was entitled to recover at all, was he entitled to maintain an action under both acts? The judges differed as to what had been decided in the *Sweetland* case. Three of them were of the opinion that it decided that two remedies did not exist, while two of them were of the opinion that it did not so decide and that the question was still open. Four opinions were rendered in this case also. The Chief Justice, who, in the *Sweetland* case, was of the opinion that recovery could be had under both acts, stoutly adhered to his former conclusion; declared that upon that question his views not only remained unchanged but had been fortified by a re-examination of the cases; that he did not understand that anyone contended that it was incompetent for the legislature to give remedies to two parties for the same wrongful act; that there was no declaration in either of the statutes that two remedies did not exist; and that the judgment of the court below should be affirmed. The Justice who had expressed no opinion on this question in the *Sweetland* case said that "no legal question has been brought to my attention recently in which there is more conflict in the decisions of the courts. The opinions are contradictory, and it would be difficult to reconcile them with each other," and after a review of authorities, reached the conclusion that "the language of the two acts is not ambiguous. There is nothing, to my mind, in the language of the Death Act which indicates that it was intended to repeal the Survival Act; or in the language of either act which precludes a representative of the estate of the deceased from recovering for the benefit of the estate under the Survival Act, and for the benefit of the persons entitled to the personal property of the deceased under the Death Act;" and he agreed with the Chief Justice that the judgment of the court below should be affirmed. The other three Justices concurred in holding that a double remedy did not exist, and the judgment of the court below as to the count upon the Death Act was reversed, and as to the recovery upon the count based on the Survival Act affirmed.

In the *Carbary* case[3] it is said, in reference to these two acts, in an opinion from which no one dissented, and in respect to a declaration containing a count under each, "it must be admitted that there is not a double remedy, and that the existence of one cause of action is entirely inconsistent with the existence of the other." The question is therefore settled in this state. The Survival Act and the Death Act do not give a double remedy for the same wrongful act.

[3] Carbary v. Detroit Railway, 157 Mich. 683.

What are the circumstances that invoke one of these acts rather than the other? When must the plaintiff count upon the Survival Act and when upon the Death Act? Contradictory answers have been given by the different judges to these questions. In the *Sweetland* case, two of the judges were of the opinion that the Death Act applied in all cases where death results from a wrongful act, and the Survival Act, when death results from other causes; one of the judges favored a construction limiting the operation of the Death Act to cases where death was instantaneous and allowing the Survival Act to apply whenever a right of action accrued to the person injured; and, as we have seen, one of the judges was of the opinion that under proper circumstances, two remedies might be in force at the same time for the same wrongful act. In the *Dolson* case the judge, who, in the *Sweetland* case, had inclined to the construction limiting the operation of the Death Act to cases where death was instantaneous, entered upon a re-examination of the question and reached the conclusion that where death was not instantaneous, the administrator recovers under the Survival Act, and if death be instantaneous, he recovers under the Death Act. In this conclusion two of the other judges concurred, admitting, however, that they had "expressed somewhat different views in the *Sweetland* case" and saying they now concurred "that a rule might be established for the guidance of the Circuit Courts and parties in future cases." One of the judges who concurred in this view in the *Dolson* case vigorously dissented from it in the *Sweetland* case and gave an illustration showing that its practical application would lead to absurd results and that its adoption would be opposed to a number of Michigan cases[4] which he cited, and closed his criticism by saying: "If, therefore, the Death Act can be applied only to cases where the death was instantaneous, it ought to be amended in order that the widow and children of the deceased may have some benefit from it." Another of the judges, referring to the view adopted in the *Dolson* case, said that when it was suggested in the *Sweetland* case "none of the other justices concurred." Notwithstanding this difference of opinion later cases[5] show that the doctrine has been firmly established that "where the death is not instantaneous, the administrator recovers under the Survival Act,

[4] Van Brunt v. Railroad Co., 78 Mich. 530; Hunn v. Railroad Co., 78 Mich. 513; Sweet v. Railroad Co., 87 Mich. 559; Richmond v. Railroad Co., 87 Mich. 374; Schlacker v. Mining Co., 89 Mich. 253; O'Donnell v. Railway Co., 89 Mich. 174; Pennington v. Railway Co., 90 Mich. 505; Racho v. City of Detroit, 90 Mich. 92.

[5] Jones v. McMillan, 129 Mich. 86; Kyes v. Valley Telephone Co., 132 Mich. 281; Storrie v. Grand Trunk Elevator Co., 134 Mich. 298.

and that, where the death is instantaneous, the recovery, if any, must be under the Death Act."

Another very interesting question has arisen in this connection: *When* is the death *instantaneous* within the meaning of the rule that we have seen was finally adopted? Here also different views have been expressed. In speaking of the count upon the Survival Act in the *Sweetland* case, one of the judges says: "The rule deducible from the above authorities and we think also from sound reason is, that plaintiff must show that there was conscious suffering in order to sustain his suit for damages. It is not sufficient to show that the deceased might have lived a few moments after the action." Two other judges seemed to have concurred in this statement. It is probable, however, that this statement was made with reference only to the right to recover damages for pain and suffering and not intended as a necessary test to recovery under the Survival Act. In the same case another judge said: "Manifestly, had death not been immediate, an action would have accrued, which might have been maintained and recovery had by the deceased, if he should live long enough; and if not, then by his representative, under the Survival Act then existing. But on the other hand, if death was instantaneous, a right of action could not accrue to him, though it would have done so, as we have already seen, had he lived long enough to suffer pain or injury of any kind." In the *Dolson* case, two of the justices say: "If the injury had occasioned immediate death, no one questions but that the action must have been brought under the Death Act, and no other action would lie." In another case,[6] where the injured party lived for three days and the action was based upon the Death Act, the Supreme Court, in reversing the case upon other grounds, says: "From the undisputed facts, it is apparent that the rule laid down in the 'Dolson case' was not followed. A right of action existed in favor of the deceased, which survived, if any right of action existed; and the statute does not give a right of action for causing this death. The case was, therefore, tried upon a wrong theory. The mistake appears to have been mutual, and it was, perhaps, a natural one, in view of the uncertainty then existing upon the rule that would ultimately be laid down by this court."

In the *Olivier* Case,[7] "plaintiff's intestate was injured, while riding in a wagon, through a collision with a street car. He was rendered unconscious, in which condition he remained until his death upon the succeeding day." The declaration contained counts under

[6] Jones v. McMillan, 129 Mich. 86.

[7] Olivier v. Houghton County Street-Railway Co., 134 Mich. 367.

both the Survival Act and the Death Act. It was undisputed upon the trial that the deceased lived until the day following his injury. The court below, therefore, excluded all testimony on the counts based on the Death Act. Plaintiff, obtaining verdict and judgment for only four dollars, brought error and raised the question whether he was entitled to recover under the Death Act. In an opinion in which all the judges concurred, it is said:

> "We see no reason for splitting hairs as to what is meant by instantaneous death, though we can appreciate the difference between a continuing injury resulting in drowning, or death by hanging, throwing from a housetop, etc., and one where a person survives the wrongful act in an injured condition. There is no occasion for saying that one dies instantly because such survival is accompanied by a comatose condition, or unconsciousness, or insanity, or idiocy. The law draws no such distinction between the normal and abnormal, or the rational and irrational. Either has a right of action. In some cases the intervention of a next friend is necessary, but that makes no difference. See 8 Am. & Eng. Enc. Law (2d Ed.), 866; and see, also, *Keilow* v. *Railway Co.*, 68 Iowa, 470 (23 N. W. 740, 27 N. W. 466, 56 Am. Rep. 858), where it was held that survival of the injury for a moment is sufficient to permit the cause of action to vest and survive. * * *"

The rule laid down in this case seems to be definite and certain and one that could be easily applied. We are not so sure, however, of this in the light of another case[8] decided December 30th, 1909. The facts were as follows: Decedent was struck by a street car. "He was carried under the car and crushed, so that when taken out, life was extinct. He was heard to groan for about fifteen minutes after the accident." The plaintiff counted upon the Death Act, and obtained a verdict. Defendant brought error and, as one ground, urged that plaintiff had selected the wrong remedy. In passing upon the question, the court said:

> "The action is planted upon the so-called Death Act, and defendant contends that, as under the undisputed testimony, plaintiff's deceased continued to live for some fifteen minutes after he was struck, though he was dead when taken from beneath the car, the appropriate remedy is under the Survival Act, citing the case of *Olivier* v. *St. Ry. Co.*, 134 Mich. 367. We are of the opinion that this case is distinct

[8] West, admrx., v. Detroit United Railway, 159 Mich. 269.

authority for the opposite view. Where there is a continuing injury, resulting in death within a few moments, it is instantaneous within the meaning of the statute."

In a still later case[88] (July 14th, 1910,) the declaration contained a count upon the Survival Act and one upon the Death Act. The deceased survived the original injury from ten minutes to perhaps half an hour. The court below was of the opinion that plaintiff had no cause of action under the Survival Act. Error was assigned and the Supreme Court in reversing the case, said:

"We are of the opinion that it cannot be said as a matter of law, upon this record, that the Survival Act did not apply. This case does not fall within the principle of the case of *West* v. *D. U. R.*, 159 Mich. 269. In that case the direct cause of death continued to operate directly upon the injured person until life was extinct. In the present case the direct cause of death did not operate continuously but ceased with the first blow, and plaintiff survived the original injury from ten minutes to perhaps a half hour. In our opinion the facts disclosed by this record bring the case within the principle of *Olivier* v. *St. Ry. Co.*, 134 Mich. 367."

Can it be said that these cases furnish a definite and certain test as to the applicability of these statutes under all circumstances? We have seen that it has been settled that an action cannot be maintained under both acts for the same injury; that the Death Act applies in all cases where the death is instantaneous; but just when, within the meaning of the rule, death is instantaneous, appears to be left in doubt.

In the *Sweetland* case it is said: "There is one view of the law that might reconcile these two acts without doing violence to either, and give a certain and definite rule. It is, that where the person is injured, and lives after the transaction, a right of action accrues to him, which survives in case of his death before judgment, and that in such case the Death Act has no application. But, if the person is killed outright, no right of action could accrue to him, therefore none could survive, and consequently the Death Act could furnish the only relief."

In the *Dolson* case, in speaking of the Death Act, it is said: "We find then, that, where death *prevented an action from accruing* to the deceased, this act gave a remedy, and in no other case; in other words, where the action was *not prevented from accruing*, it did not give a remedy. This section plainly proceeds upon the theory

[88] Ely, admrx., v. Detroit United Railway et al., 17 D. L. N. 636.

that death has prevented a right of action from vesting. Such would not be the case where a person lived after the injury, and it would be the case where the death was instantaneous * * *"

We have seen in the *Olivier* case that authorities were cited, apparently with approval, holding that "survival of the injury for a moment is sufficient to permit the cause of action to vest and survive." We have also seen that conscious suffering has been mentioned in this connection, yet it is said in the *Olivier* case that "there is no occasion for saying that one dies instantly because such survival is accompanied by a comatose condition, or unconsciousness, or insanity, or idiocy. The law draws no such distinctions between the normal and the abnormal, or the rational and irrational. Either has a right of action * * *"

The rule stated in the *Dolson, Sweetland* and *Olivier* cases would seem to possess the requisite legal certainty and definiteness. It is this: If death results instantly, then no cause of action vests and consequently none survives; if death does not result instantly, a cause of action vests and one survives; consciousness or unconsciousness has no effect whatever upon the vesting of the cause of action in the injured party and consequently no effect upon its survival.

Applying this rule to the facts in the *West* case, it would seem that plaintiff should have based his action upon the Survival Act. The deceased "was heard to groan for about fifteen minutes after the accident," yet the court held that "a continuing injury resulting in death within a few moments is instantaneous within the meaning of the Death Act;" and in answer to the contention of counsel for the defendant, based upon the *Olivier* case, "that as, under the undisputed testimony, the plaintiff's deceased continued to live for some fifteen minutes after he was struck, though he was dead when taken from beneath the car, the appropriate remedy is under the Survival Act," the court said: "We are of opinion that this case is distinct authority for the opposite view. Where there is a continuing injury, resulting in death within a few moments, it is 'instantaneous' within the meaning of the statute."

The following questions suggest themselves: Did not a cause of action vest in the injured party during the fifteen minutes that he lived after he was struck? If it vested, would it not survive? If it survived, should not the action have been based upon the Survival Act? If no cause vested during the fifteen minutes, how much time must have elapsed in order that one would have vested? Does not the rule that we have seen was previously stated, as well as the

reason upon which that rule was based, furnish a ready answer to each of these questions?

Starting again with the rule in the *West* case, namely, "where there is a continuing injury resulting in death within a few moments, it is 'instantaneous' within the meaning of the statute," let us apply it to the facts in the *Ely* case. Here, as we have seen, the injured party survived the original injury from ten minutes to a half hour. The theory, therefore, that, in this case, an action could be sustained under the Survival Act, assumes that a cause of action could vest in the injured party in ten minutes; a shorter time than the injured party lived in the *West* case. It would seem that if in the one case the Survival Act applied, it would do so in the other. The court, however, distinguished them as follows: In the *West* case the direct cause of death continued to operate directly upon the injured person until life was extinct; in the *Ely* case the direct cause of death did not operate continuously but ceased with the first blow. The facts were that in the *Ely* case, the deceased met his death as a result of being struck on the head by the trolley-wheel and pole of an interurban car, and in the *West* case, the deceased was struck by and carried under a rapidly moving street car and crushed so that when taken out life was extinct. In endeavoring to appreciate the distinction made by the court in these two cases, the following questions naturally present themselves: Assuming that the direct cause of death continued to operate directly upon the injured person until life was extinct, would this make any difference, assuming also that the first negligent blow was fatal? Are not both of these contingencies entirely probable? Should the fact that the defendant continued to repeat his negligent act until life was extinct, make any difference? Might there not well be a series of negligent acts or blows, any one of which would be fatal? Why should importance be attached to the fact that life was extinct when the injured party was taken from under the car? Suppose the party when first struck by the car, is thrown to one side of the street, and expires there, would this make a difference?

When it is remembered that the damages recoverable under the Survival Act differ substantially from those recoverable under the Death Act, it would seem that a more rational and practical basis should be found for the application of these acts respectively.

As to the measure of damages, one rule applies under the Survival Act and another rule under the Death Act. The Survival Act "is silent upon the question of damages and refers to classes of action which have long existed independent of statutes. The common law, not statute, fixed the measure of damages in these actions

before Michigan was a state, or the United States a government, and it was not changed."[9] The court below in the *Kyes* case[10] instructed the jury as follows:

> "The plaintiff is entitled to recover the same damages that the deceased would have been entitled to recover had he brought the action in his lifetime. That is to say, you may award such damages as in your judgment would be a fair compensation for the loss sustained by the deceased by reason of the injuries he received. You are to consider his age, his habits of industry, his ability to labor, his capacity to earn money, and the wages he was in the habit of earning when injured, and the length of time he would probably have lived had he not been injured, the loss he sustained by reason of being deprived by such injuries of the ability to labor and earn money during the time he probably would have lived had he not been injured,—using your best judgment, under all the facts and circumstances in the case, in arriving at what would be a just compensation for such loss."

The Supreme Court held that the instruction of the court below was correct and pointed out that in the *Dolson* case it was said "that the administrator could recover 'the full measure of damages for the benefit of next of kin'," and further said, "when an action survives, the representatives of the deceased are entitled to recover the same measure of damages that he could have recovered if he had lived to bring his suit to a successful issue."

In the *Olivier* case[11] the court below "was of the opinion that the damages must be limited to the amount that deceased could have earned during the few hours that he lived after receiving the injury." Under this view the plaintiff recovered a judgment for four dollars. In reversing the case the Supreme Court said:

> "Counsel for the defendant urge that the damages recoverable in such a case should be only (1) the injury to feelings, pain and anguish of deceased while he actually lived, and (2) the loss of earnings during the remainder of the time that he actually lived. This is an unreasonable limitation. We need not discuss the reasoning by which the result is reached. We have long ago held that prospective damages are recoverable. An injured person may recover for loss of

[9] Norblad v. Minneapolis, etc., R. Co., 156 Mich. 697; Ingersoll v. Detroit & M. Ry. Co., 128 N. W. 227 (Decided Nov. 11, 1910).

[10] Kyes v. Valley Telephone Co., 132 Mich. 281.

[11] Olivier v. Houghton County St.-Ry. Co., 134 Mich. 367.

earnings for the period during which the evidence fairly shows that he would have lived but for the injury. This rule would apply to one who should live long enough to try his case, though he should die the following day. But defendant's contention would substitute another rule upon a second trial after his death, should such trial become necessary. Such recovery is based upon the actual damages suffered through the accident. On the first trial the recovery is based upon a probable prospective incapacity for a probable period. After death, such incapacity (and consequent loss) is made certain, where it was only probable before. The period alone remains uncertain. As to pain and mental suffering, it is different. Upon the first trial, the duration of such pain and suffering is uncertain; upon the second, it is definite. As has been already suggested, it is not a new doctrine that prospective damages, when reasonably certain, may be recovered. It is a part of the right that survives under the act, as was held in the *Kyes* case. Such a construction removes the only objection that can be urged against the view which we have taken of the Death Act. It gives to the representative the absolute right to the remedy which his ancestor had, instead of leaving it to depend upon the accident of his dependency."

When this case came on for trial again in the court below, that court refused to instruct the jury that it should deduct what it "would probably cost decedent for his food, clothing, and other personal expenditures." The plaintiff recovered a verdict for $7,300. The case was again taken to the Supreme Court,[12] and the principal question raised was that the court committed error in this refusal In affirming the judgment it was said:

"In my opinion, the trial judge correctly interpreted and applied the decision of this court given on the former hearing of this case. 134 Mich. 367. In that case it was held that the plaintiff might recover for the loss of earnings which the evidence fairly shows that deceased would have made during the period which he would have lived, but for the injury. This rule is to my mind the only just one to apply. The present plaintiff sues in a representative capacity. He ought to be able to demand the same damages that the deceased might have exacted if the action had been brought to trial during the latter's lifetime. If this be not so, then the statute is in part inoperative, and the action does *not* survive to

[12] Olivier v. Houghton County St.-Ry. Co., 138 Mich. 242.

the legal representative, except in a limited degree. But we held in *Kyes* v. *Telephone Co.*, 132 Mich. 281, and in *Olivier* v. *Railway Co.*, 134 Mich. 367, that the administrator is entitled to the same damages that deceased could have recovered, had he lived to bring the suit to a successful issue. * * *"

"Still more inequitable is the suggestion that the plaintiff's damages ought to be reduced because the defendant, by the severity of the injuries inflicted, succeeded in relieving the deceased of the burden of supporting himself after a short period, as the injury shortened his life. In the first place, such a contention erroneously presupposes that the tort feasor is concerned in the manner in which his victim shall dispose of the damages which he receives for his injuries. With all respect for the contention, it may be stated that it is none of the defendant's business how the injured party disposes of the money received in compensation for the injury. The fallacy is in assuming as a premise (although not so stated) that the action is, in some sense, to recover for the cost of the injured party's maintenance. This is in no sense true. The action is to recover the damages which have resulted as a present loss to the injured party, in being deprived of a capacity to earn money, which capacity he had before the injury, and which he now has not. That capacity he had, with an assurance of a continuance for his expectancy of life (subject, of course, to ordinary vicissitudes as to sickness). He has it not now for any period. If we subtract nothing from such expectancy, we have as a result the period of earning capacity of which the injured party is deprived * * *"

In the *Miller* case[13] the court below in its instruction to the jury followed the *Kyes* case and the *Olivier* case respecting the probable earnings of the deceased during the time that he probably would have lived and added to this the pain and suffering endured up to the time of death, but failed to limit the earnings to the *present worth of the wages*. This was affirmed in the Supreme Court, except that it was held that the jury should be instructed to allow only the present worth of the wages.

In the *Davis* case[14] the court below instructed the jury as follows:

"If you find for the plaintiff, you will render a verdict for all damages sustained in consequence of the injury to and death of the young man. These will comprise a reasonable

[13] Miller v. Sadowsky, 138 Mich. 502.
[14] Davis v. Mich. Central R. Co., 147 Mich. 479.

amount for any pain and suffering he endured from the time of the injury to his death, and, in addition, a reasonable amount for all sums that he would probably have earned during the years that he would probably have lived, but for the injury. Your verdict will be the sum of these two. You are not concerned with the amount of earnings that the young man would probably have saved during his probable life, but only with the probable earnings themselves. The table of expectancy put in evidence shows that, if of good health, he might have lived 40 years longer than he did. Estimate the present worth of his probable earnings during the time that he would probably have lived at 5 per cent. simple interest for each year, and the sum of these for several years that he would probably have lived will be the amount of your verdict for loss of earnings."

The Supreme Court said that the measure of damages given in this instruction was correct, and it is stated in the syllabus that the damages recoverable under the Survival Act "include the present worth of the intestate's earnings during his probable lifetime, had he not been injured, undiminished by the expense of his living during that time."

The following propositions would seem to be settled by these cases respecting the measure of damages under the Survival Act: That this act did not change the common law rule; that this rule is that the personal representative is entitled to recover the same amount of damages that the injured party could have recovered had he lived to prosecute the suit himself; that in estimating the damages under this act it is proper for the jury to consider the earning ability of the party injured, the length of time he probably would have lived had he not been injured, and the loss he sustained by reason of being deprived, by such injuries, of the ability to labor and earn money during this time, the sufferings, pain and anguish during the time that he actually lived after the injury; that no deduction should be made from the earnings on account of what it would have cost deceased for food, clothing, or other personal expenditures during the time he would have lived but for the injury; and that in estimating the earnings it is the present worth that should be allowed and not the sum total of the wages that deceased might have earned.

The rule respecting the measure of damages under the Death Act, is wholly different from that obtaining under the Survival Act. The statute itself provides that "the jury may give such damages as they shall deem fair and just with reference to the pecuniary

injury resulting from such death." It is firmly established by the decisions that in an action brought under this act "the damages to be awarded must be limited to the pecuniary loss sustained by those in whose interest the case is prosecuted."[15]

In the *Cooper* case, supra, in referring to the provisions of the Death Act, the Supreme Court said:

> "The statute authorizes the jury, in every case of this kind, to give such amount of damages as they shall deem fair and just to the persons who may be entitled to the same when recovered. Under this statute the jury are not warranted in giving damages not founded upon the testimony, or beyond the measure of compensation for the injury inflicted. They cannot give damages founded upon their fancy, or based upon visionary estimates of probabilities or chances. The rule of damages in actions for torts do not apply to actions of this kind. The statute gives the right to damages; but it has been held, with rare exceptions, that they must be confined to those damages which are capable of being measured by a pecuniary standard."

The statement quoted above has been repeated with approval in the subsequent cases of *Balch* v. *G. R. & I. R. R. Co.*, *Hurst* v. *Det. City Ry.*, and *Snyder* v. *Lake Shore, etc., R. Co.*, supra.

The case of *Van Brunt* v. *Railroad Co.*, supra, was one brought by an administrator against the railroad company under the railroad law providing that the jury should give such damages as are fair and just, which should be distributed to the persons entitled under the statute of distribution. The court held that under this law the measure of damages was the same as under the Death Act. In this case the proof showed that the deceased was a young man, unmarried, and about twenty-two years of age at the time of his death. There was no evidence that anyone was dependent upon him for support, but it was assumed by the court for the purposes of the case that he had a father and a brother living. The Supreme Court sustained the court below in taking the case from the jury on the ground that the proof showed no person was pecuniarily injured by the death of the plaintiff's intestate. In the *Hurst* case, supra, it is said that the Death Act "provides that when a person is killed by

[15] Gorton v. Harmon, 157 Mich. 473; Snyder v. Lake Shore, etc., R. Co., 131 Mich. 418; Fluhrer v. Lake Shore, etc., R. Co., 121 Mich. 212; Walker v. Lake Shore, etc., 111 Mich. 518; Nelson v. Railway Co., 104 Mich. 582; Charlebois v. Railroad Co., 91 Mich. 59; Hurst v. Detroit City Ry., 84 Mich. 539; Balch v. G. R. & I. R. R. Co., 67 Mich. 397; Van Brunt v. Railroad Co, 78 Mich. 530; Cooper v. L. S. & M. S. Ry. Co., 66 Mich. 261; Mynning v. Det., Lans. & North. R. R. Co., 59 Mich. 257; Chic. & N. W. Ry. Co. v. Bayfield, 37 Mich. 204; Ingersoll v. Detroit & M. Ry. Co., 128 N. W. 227 (Decided Nov. 11, 1910).

negligence, and pecuniary injury results, the right of action for such injury survives to the personal representatives. It clearly contemplates that pecuniary injury must result from the negligent act; and therefore, to entitle the party to recover in such action, the negligence must not only be established, but also some pecuniary injury or loss must be shown by evidence. Such damages for the loss of prospective earnings are special in their character, and must be specially pleaded, and a recovery can only be had based upon evidence establishing the fact."

In the case of a son or daughter or wife, it is held that the cost of maintenance must be deducted from the value of the services, and the pecuniary loss in each case is the value of the services less the cost of maintenance,[16] and that a pecuniary injury resulting from the death of a person can only be measured by the standard of the pecuniary value of the life of such person, and its loss to the person entitled to such damages when recovered.[17] The following have been excluded as elements of damages: Loss of occasional assistance in studies rendered by a father to his children;[18] compensation for grief, loss of companionship, wounded feelings, or suffering, either of the deceased or of the beneficiary;[19] injuries that are not susceptible of compensation by a money consideration;[20] damages founded upon the fancy of the jury, or based upon visionary estimate of probabilities or chances;[21] the poverty of those in whose interest the action is prosecuted and the wealth of the defendant;[22] the profits resulting from a son's labor and which could have been procured by employing a substitute for the deceased;[23] mental suffering and injured feelings, or any other injuries not susceptible of compensation by a money consideration to those who are entitled, and all other elements not based upon well-defined facts or known circumstances susceptible of some proof under the well-settled rules of evidence;[24] and in the case of a minor child, all pros-

[16] Moers v. Det. United R'y Co., 158 Mich. 659; Gorton v. Harmon, 152 Mich. 473; Snyder v. Railway Co., 131 Mich. 418; McDonald v. Steel Co., 140 Mich. 401.

[17] Rajnowski v. Railroad Co., 74 Mich. 20.

[18] Walker v. Lake Shore, etc., R. R. Co., 111 Mich. 518.

[19] Nelson v. Railroad Co., 104 Mich. 582.

[20] Van Brunt v. Railroad Co., 78 Mich. 530.

[21] Balch v. G. R. & I. R. R. Co., 67 Mich. 394; Cooper v. L. S. & M. S. R'y Co., 66 Mich. 261; McDonald v. Champion Iron and Steel Co., 140 Mich. 401; Moers v. Michigan United Railway Co., 158 Mich. 659; Snyder v. L. Shore, etc., R. R. Co., 131 Mich. 418.

[22] Chicago, etc., R. R. Co. v. Bayfield, 37 Mich. 204.

[23] Moers v. Det. United R'y Co., 158 Mich. 659.

[24] Gorton v. Harmon, 152 Mich. 473; Kalis v. Det. United R'y, 155 Mich. 485; McDonald v. Champion Iron & Steel Works, 140 Mich. 401; Hurst v. Det. R'y Co., 84 Mich. 539; Mynning v. Det., Lansing & Nor. R. R. Co., 59 Mich. 257; Chicago & N. W. R. R. Co. v. Bayfield, 37 Mich. 205.

pective earnings extending beyond the expectancy of the lives of the parents and the survivor of them.[25] No exemplary damages are allowed[26] and no damages can be recovered for pain or suffering; mental or physical.[27]

It has been held in two recent cases[28] that a count under the Survival Act may be joined with a count under the Death Act. In the *Carbary* case, a declaration containing a count under each act was demurred to, and it was contended that the counts on their face were inconsistent, as one alleged that the plaintiff's intestate lived ten minutes after the accident, while the other was based on instantaneous death. It was also claimed that the two rights of action did not accrue to the plaintiff in the same right, as the damages recovered under the Survival Act would belong to the estate of the deceased, while under the Death Act the damages recovered would be distributed to the next of kin shown to have been injured, and it was also urged that the measure of damages was not the same in both cases. The action of the lower court in overruling the demurrer was sustained, the Supreme Court saying in substance that the right of action under each act was an asset of the estate; that under either the plaintiff would be the personal representative; that neither a difference in distributive right nor in the measure of damages was an obstacle to the joinder; that cases might arise where the right of recovery was certain but the remedy uncertain, and dependent upon what might be disclosed at the trial, and what a jury might conclude, respecting the conjunction in point of time of accident and death, and that such a case would almost require a joinder to prevent delay, expense, and the danger of "falling between two stools" as the result of successive verdicts; that plaintiff had no choice; that a recovery could not be had on both counts, and defendant was entitled to the concurrence of the jurors on one or the other; that the right of joinder was within the rule laid down in other Michigan cases; that the wisdom of permitting a joinder to meet the exigencies of varying testimony had often been vindicated; that neither the difference in the distribution of the damages nor in the measure of damages should preclude the joinder; and it was admitted that there was not a double remedy, that the existence of the cause of action set up in one count was entirely inconsistent with the existence of that set up in the other, and that the right of joinder was denied by the courts of some jurisdictions.

[25] Hurst v. Det. City R'y Co., 84 Mich. 539.
[26] Rajnowski v. R. R. Co., 74 Mich. 20.
[27] McDonald v. Champion Iron & Steel Co., 140 Mich. 401.
[28] Carbary v. Det. United R'y, 157 Mich. 683; Pritchett v. Det., Jackson & Chicago R'y Co., 157 Mich. 687.

After some hesitation on the part of the court, it may be regarded as settled that a declaration counting upon one of these acts cannot be changed by amendment so as to count upon the other act.[29] Among the reasons given for denying the right of amendment are the following: That it would introduce a new and different cause of action; that the measure of damages is different; that satisfaction of a claim under one of these acts would be no bar to a claim under the other; that the claim under one of the acts was given by statute, while under the other it was given by the common law; and that the proof of a cause of action under one act would not sustain a cause of action under the other.

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[29] Jones v. McMillan, 129 Mich. 86; Hurst v. Det. City R'y, 84 Mich. 539; Walker v. Lans. & Suburban Traction Co., 144 Mich. 685; Fournier v. Det. United R'y Co., 157 Mich. 589.