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*Mar. 28.
*May 31.

THE CORPORATION OF THE TOWN OF WALKERTON (DEFENDANTS)..... ..... } APPELLANTS;

AND

ANNA ERDMAN, EXECUTRIX OF THE LATE JOHN B. ERDMAN, (PLAINTIFF) ..... } RESPONDENT;

AND

R. E. HEUGHAN, THIRD PARTY ADDED BY ORDER OF COURT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Evidence—Action for personal injuries caused by negligence—Examination of plaintiff de bene esse—Death of plaintiff—Action by widow under Lord Campbell's Act—Admissibility of evidence taken in first action—Rights of third party.

Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children are in effect, claiming through the deceased. Therefore, where an action is commenced by a person so injured in which his evidence is taken *de bene esse* and the defendant has a right to cross-examine such evidence is admissible in a subsequent action taken after his death under the act. Taschereau and Gwynne JJ. dissenting.

The admissibility of such evidence as against the original defendants, a municipal corporation sued for injuries caused by falling into an excavation in a public street, is not affected by the fact that they have caused a third party to be added as defendant as the person who was really responsible for such excavation and that such third party was not notified of the examination of the plaintiff in the first action, and had no opportunity to cross-examine him. Taschereau and Gwynne JJ. dissenting.

PRESENT:—Fournier, Taschereau, Gwynne, Sedgewick and King JJ.

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APPEAL from a decision of the Court of Appeal for Ontario, (1) affirming the judgment of the Divisional Court (2) by which a new trial was ordered.

The action in this case was brought under Lord Campbell's Act in consequence of the death of John B. Erdman, from injuries received by falling into an excavation in one of the streets of the town. Erdman before his death had instituted an action for damages for such injuries in which by order of the court his evidence was taken *de bene esse* counsel for the town appearing at such examination and cross-examining. The sole question to be decided on this appeal is whether or not such evidence was admissible on the trial of the present action. The trial judge refused to receive it, and there being no other evidence of the manner in which deceased was injured the plaintiff was non-suited. The non-suit was set aside by the Divisional Court and a new trial ordered which was affirmed by the Court of Appeal from whose decision this appeal was brought.

The defendants had caused Heughan to be added as a defendant alleging that he was responsible for the excavation into which the deceased fell. Heughan was not served with notice of the examination of deceased and so had no opportunity to cross-examine him.

Aylesworth Q.C. for the appellants. Lord Campbell's Act gives a new cause of action and one entirely different from that which deceased had in his lifetime. *Morgan* v. *Nicholl* (3); *Canadian Pacific Railway Co.* v. *Robinson* (4).

As regards this action the plaintiff is in no way in privity with the deceased. *Leggott* v. *The Great Northern Railway Co.* (5); *Wood* v. *Gray* (6).

(1) 20 Ont. App. R. 444.
(2) 22 O.R. 693.
(3) L.R. 2 C.P. 117.
(4) 19 Can. S.C.R. 292; [1892] A.C. 481.
(5) 1 Q.B.D. 599.
(6) [1892] A.C. 576.

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The former action might have been revived when the evidence could have been used; *Mason* v. *Town of Peterborough* (1); but the plaintiff elected to proceed for her own benefit and lost the right to profit by the former proceedings.

Shaw Q.C. for the respondent. The issues in both actions are substantially the same, and the evidence comes within the rules laid down in the books. Greenleaf on Evidence (2); *Read* v. *Great Eastern Railway Co.* (3).

The plaintiff in this action is bound by any admissions made by deceased, which shows privity. *Griffiths* v. *Earl Dudley* (4).

O'Connor Q.C. for third party.

FOURNIER J.—I am of opinion that this appeal should be dismissed.

TASCHEREAU J.—I would allow this appeal. I concur in my brother Gwynne's opinion.

GWYNNE J.—This is an action brought by the plaintiff as widow and administratrix of the late John Erdman, to recover for her own benefit and the benefit of her children by the said John Erdman, damages sustained by them respectively by the death of the said John Erdman, pursuant to the provisions of the statute in that behalf, the death of the said John Erdman being, in the plaintiff's statement of claim, alleged to have been caused by falling into a deep hole, ditch or drain which had, by the Corporation of the town of Walkerton, their servants and agents, been negligently permitted to be dug, and was negligently left open, uncovered, unfenced and unprotected.

(1) 20 Ont. App. R. 683.
(2) 15 ed. sec. 164.
(3) L.R. 3 Q.B. 555.
(4) 9 Q.B.D. 357.

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The defendants, the town of Walkerton, under the provisions of sec. 531 of ch. 184 R.S O. as amended by 54 Vict. ch. 42, sec. 24, caused one R. E. Heughan to be made a party defendant, or third party, as being the person who had dug the ditch or drain, and was responsible for all consequences arising from the matters alleged in the plaintiff's statement of claim, if proved as alleged, and among other defences they further pleaded as follows:

These defendants further say that the hole, or ditch or drain mentioned in the plaintiff's statement of claim was dug, made and left in the condition in which it was at the time of the said accident, not by these defendants but by the defendant Heughan, who was not a servant or agent of these defendants, and who so dug and made the said excavation without their consent or knowledge, and if any damages and costs are recovered in this action against the defendants they aver that such damages were sustained by reason of the said obstruction, excavation or opening in the said highway, and pursuant to the statute claim to recover over against said Heughan the amount of any such damages and costs together with the costs incurred by the said corporation in their defence of this action.

The defendant Heughan denied all the allegations in the plaintiff's statement of claim made, except those made in the first and second paragraphs thereof, and he further, among other things, pleaded as follows:

5. The defendant R. E. Heughan further says that the plaintiff's statement of claim does not show any cause of action as against the defendants, the Corporation of the town of Walkerton, and he claims the same benefit from this objection as if he had demurred to said statement of claim.

6. The said R. E. Heughan further says that he craves the benefit of any defence the said Corporation of the town of Walkerton may have to said action.

7. The said R. E. Heughan further says that if it be proved that the said John B. Erdman was wounded, damaged or injured in any way by falling into said trench, ditch or drain, that the said wounds, damages or injuries did not cause or occasion the death of the said John B. Erdman.

8. The said R. E. Heughan further says that the said John B. Erdman might and could, by the exercise of reasonable care and

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diligence, have seen the said hole, ditch or drain and avoided falling into it, or sustaining any injuries by reason thereof; and the said R. E. Heughan says as the fact is that the said alleged accident and the injuries alleged to have been sustained by said John B. Erdman thereby were caused by his own negligence and want of care.

Upon these pleading issue being joined the case went down for trial.

The law in virtue of which Heughan was made a party defendant in the present action, ch. 184, R. S.O., sec. 531, subsec. 4 enacts that:

> In case an action is brought against a municipal corporation to recover damages sustained by reason of any obstruction, excavation or opening in a public highway, street or bridge placed, made, left or maintained by any other corporation, or by any person other than a servant or agent of the municipal corporation, the last mentioned corporation shall have a remedy over against the other corporation or person for, and any enforce payment accordingly of, the damages and costs, if any, which the plaintiff in the action may recover against the municipal corporation.
>
> Subsec. 5. The municipal corporation shall be entitled to such remedy over in the same action if the other corporation or person shall be made a party to the action, and if it shall be established in the action as against the other corporation or person, that the damages were sustained by reason of an obstruction, excavation or opening as aforesaid, placed, made, left or maintained by the other corporation or person, and the municipal corporation may in such case have the other corporation or person added as a party defendant or third party for the purposes hereof, if the same is not already a defendant in the action jointly with the municipal corporation, and the other corporation or person may defend such action as well against the plaintiff's claim as against the claim of the municipal corporation to a remedy over.

The effect of this statute, as it appears to me, is to make the third party so made defendant a principal defendant equally with his co-defendant, and where no question arises as to the fact of the obstruction alleged to have caused the injury complained of having been made by him (and in the present case no such question arises) as a principal defendant, and as the person ultimately liable, he has a right to insist

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that the plaintiff's case shall be established by such evidence as would be necessary to bind him if he was sole defendant, and to assert such rights even by appeal, whether the appeal be in the name of his co-defendant or in his own name. The judgment to be recovered by the plaintiff in such an action being made by the statute conclusively binding upon him the plaintiff's cause of action must be proved by evidence which would be binding on him, and no proceeding in the action can be taken behind his back, or without notice to him so as to give him an opportunity of contesting the plaintiff's claim in every particular necessary to be established by him.

Now, in the present case the only evidence offered in support of the allegation that the deceased, John B. Erdman, received the injury alleged in the plaintiff's statement of claim as the cause of his death, was a deposition made in his lifetime by the said John B. Erdman, which the learned trial judge refused to receive and non-suited the plaintiff. That non-suit having been set aside and a new trial ordered this appeal is taken, and the sole question is whether the evidence was admissible. If it was not the non-suit must be restored, as it is admitted that no other evidence exists upon the point.

The deposition so rejected by the learned trial judge was procured and made in the manner following:

On the 9th March, 1892, the said John B. Erdman in his lifetime commenced by writ of summons an action against the Corporation of the town of Walkerton; immediately upon the service of that writ the corporation caused a notice of a motion for an order that the above defendant, R. E. Heughan, should be made a party defendant to the said action, to be served upon the said John B. Erdman and the said Heughan. By reason of the county or local judge at Walkerton

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being absent from home that motion could not be heard until the 25th day of March, 1892, when an order was made, the plaintiff not objecting, though represented (as alleged in the order) whereby it was ordered, among other things, that the said R. E. Heughan be, and he was thereby, made a defendant to the action.

And thereby it was further ordered that in case the said R. E. Heughan should enter an appearance that any of the parties might apply to the court or a judge for a direction as to having any question that might arise determined; and the order reserved to the said Heughan all rights that he might have to object to the examination of the plaintiff taken in the action prior to the date of the order, being read or used in evidence against him on the trial of the action.

The defendant, Heughan, appeared to the action in the Queen's Bench Division of the High Court at Walkerton, where the action was brought. After the service of notice of motion for the above order, and on the 12th March, 1892, the plaintiff caused an application to be made to the master in chambers at Toronto for, and obtained from him, an *ex parte* order whereby it was ordered that the plaintiff might be examined *vivâ voce* on his own behalf before Samuel Herbert McKay, and that the examination so taken might be given in evidence on the trial of the action, saving all just exceptions. The fact of the issue of this order at Toronto was telegraphed to the plaintiff's attorney at Walkerton on the said 12th March, who upon the same day served upon the Mayor of Walkerton and the solicitor of the corporation the notice following:

Take notice that the master in chambers has this day made an order for the making of the evidence of the plaintiff *de bene esse* before Samuel H. McKay of Walkerton, and that such evidence will be taken in the rooms of said John B. Erdman at the county jail at said town of Walkerton, on Monday, the 14th day of March instant, at seven

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o'clock in the evening, and that if you or your solicitor or agent desire to be present and to cross-examine said John B. Erdman upon the evidence so to be taken as aforesaid, you or he must then and there attend on such examination and cross-examine him.

Further take notice that the reason why such examination is required to be taken is that the said plaintiff is sick and seriously ill.

And take notice that if you object to the shortness of this notice, and do not attend to cross-examine said plaintiff at said time and place, the said John B. Erdman will be further examined at said place at the hour of ten o'clock in the forenoon on Wednesday, the 16th day of March inst., if then alive and able to give evidence.

Yours &c.,

SHAW & SHAW.

No notice of such intended examination appears to have been served upon Heughan. No one appeared for the corporation defendant, and the plaintiff was examined *ex parte*; again, the plaintiff's solicitor attended in the morning of the 16th March, but neither the corporation or their solicitor attended upon that occasion, and nothing further appears to have been then done.

But on the 17th March, 1892, the plaintiff's attorney, fearing that there might be some question as to the sufficiency of the notice of the 12th March, served upon the solicitor of the Corporation of Walkerton notice to the effect that on the 21st day of March a motion would be made before the master in chambers at Toronto for an order, that the evidence already taken of the plaintiff, under order dated 12th March, 1892, might be used subject to all just exceptions in the event of the plaintiff's death, in any action which the wife or children of the said plaintiff might bring against the defendant corporation under the Revised Statutes of Ontario, ch. 135, or in the alternative, that an order might be made for the examination of the said plaintiff *vivâ voce* on oath upon notice, giving six hours notice to the defendants of the time and place where such examination is to be held, and that the

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evidence when so taken might be filed in the cause with the deputy clerk of the crown at Walkerton, and used in any action which the said relatives of said plaintiff might bring after his death under said ch. 135, on the ground that said plaintiff was dying and that his testimony would be lost with his death.

The master in chambers, upon this motion coming before him on the 21st March, 1892, referred the first part of the motion to a judge in chambers and made an order upon the residue to the effect that without prejudice to the motion, the plaintiff should be examined once more upon oath, before Samuel Herbert McKay of the town of Walkerton, on Wednesday, the 23rd day of March, 1892, in the forenoon, in case his state of health permitted, upon notice to the defendants and the said third party, and it was thereby further ordered that notice served upon Tuesday the 22nd instant should be good and sufficient notice of such examination, and the time for giving notice was thereby shortened accordingly. And it was thereby further ordered that the examination when so taken be filed in the office of the deputy clerk of the crown for the County of Bruce, and that an office copy or copies thereof might be read in evidence on the trial of the action, saving all just exceptions, upon giving sufficient proof of the absence of the said plaintiff or of his inability to be present to testify on his own behalf at said trial.

And it was thereby further ordered that the costs of the application be reserved to be disposed of upon the pending motion. (*i.e.* on the motion reserved before the judge in chambers.)

Notice of the intended examination on the 23rd instant was, upon the 22nd March, served upon the solicitor of the defendant, the Corporation of Walkerton, but no notice appears to have been served upon

Heughan. Upon the 23rd the solicitor of the corporation attended, but abstained from cross-examining the plaintiff, upon the ground, as he alleges, that he was informed by the plaintiff's medical attendant that the plaintiff was sinking fast and could only live for a few days; and therefore, he did not in the plaintiff's state of health wish to worry him. Upon the 31st day of March Mr. Justice Street disposed, in chambers, of the motion before the master in chambers upon the notice of the 17th March so as aforesaid reserved by the master in chambers, and by an order dated the said 31st day of March, it was ordered that the said application of the plaintiff, made on the 21st day of March pursuant to the said notice of the 17th March, in so far as the same sought for an order in the nature of an order perpetuating testimony, should be and the same was thereby dismissed; and it was further ordered that the costs of the application should be costs to the defendants in any event of the action on the final taxation of costs therein.

Upon this same 31st day of March the plaintiff filed and served his statement of claim against the defendants the Corporation of Walkerton, and the defendant R. E. Heughan, therein alleged to have been made defendant by an order bearing date the 23rd day of March, 1892, and therein alleged that he had suffered injury from falling into a ditch in a street of the town of Walkerton, which the corporation of that town were alleged to have negligently suffered to remain open, uncovered, unprotected, &c. Before any pleas had been filed to this statement of claim, namely, on the following day, the plaintiff died, and that action thereby became abated.

Now the question is whether the depositions of the said John B. Erdman, so taken, are admissible as evidence for the plaintiff in the present action against

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the contention of the defendants, the Corporation and Heughan, that they are not; and I am of opinion that the learned trial judge's decision that they were not was correct and sound, and should be maintained upon the grounds following:

1. Upon the authority of the recent cases and especially since the judgment of the Privy Council in *Robinson* v. *Canadian Pacific Railway Co.* (1) it cannot be disputed in this court that the present action at the suit of the widow of the deceased, John B. Erdman, is a wholly different action in every particular from that instituted by Erdman in his lifetime. It is between wholly different parties and founded upon wholly different rights. Although the plaintiff is personal representative of the deceased she claims not in right of the deceased or of his estate, but being personal representative she is by statute authorized in that character to assert her own independent rights and those of her children.

2. The evidence is sought to be used in the present action not only against the Corporation of Walkerton but against the defendant Heughan also, and as no judgment in favour of the plaintiff can be rendered herein which is not conclusively binding upon Heughan as well as upon the corporation, he cannot be affected by depositions taken in an action to which he was not a party; *et ergo* depositions so taken cannot be used as evidence for the plaintiff in the present action.

3. The depositions of the 14th March, 1892, having been taken not only upon insufficient notice as affecting the defendants, the corporation, but behind the back of the defendant Heughan at a time when the plaintiff John B. Erdman knew of the pendency of a notice of motion that Heughan should be made a defendant, which motion was granted by the order of

(1) [1892] A. C. 481.

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the 31st March, 1892, and the depositions of the 21st March, 1892, having been taken while the said plaintiff, John B. Erdman, was aware of the still pending of such notice of motion, and without notice to the defendant Heughan of the intended taking of such depositions, although by the order of the 21st March, 1892, notice to him was made a condition precedent to the taking of such depositions, the depositions could not have been given in evidence in the former action if the statement of claim therein which was subsequently filed on the 31st March, 1892, had been pleaded to by the defendants therein and issues had been joined which had gone down for trial during the lifetime of the said John B. Erdman, if he had lived and from continuing illness had been unable to attend and be examined at the trial, because the effect of the action as stated in the statement of claim against both defendants, being by force of the statute under which Heughan was made defendant to affect him with liability, no evidence could be received to affect him which had been taken behind his back, and without notice to him. So neither could it be received to affect the corporation as, by force of the statute, judgment could not be against them without Heughan being conclusively condemned and affected thereby.

For these reasons I am of opinion that the learned trial judge was correct in his ruling at the trial and that therefore this appeal must be allowed with costs and that judgment of non-suit be ordered to be entered in the court below.

SEDGEWICK J.—I am of opinion that the appeal should be dismissed. I think the evidence was properly admitted.

KING J.—This action was brought to recover damages in respect of the death of one John B. Erdman, occa-

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sioned, as alleged, by his falling into a ditch in a public street, negligently suffered by the town to remain open and unguarded.

Erdman had in his lifetime begun an action against the town for the recovery of damages, and his evidence was taken in that cause *de bene esse* upon notice to the town which attended by its solicitor and cross-examined Erdman.

The writ in that action was issued on 9th March, 1892. On 17th March Erdman's solicitors gave to the town notice that they would apply to a master on the 21st March for an order for his examination. Prior to the 21st March the town gave notice to Heughan of a motion to be made to the local High Court Judge that he should be made a co-defendant under the act of Ontario, 55 Vict. c. 42, sec. 531. Such order was duly made on the 25th March, 1892.

Upon the return of Erdman's summons on 21st March, 1892, the master ordered that the examination of Erdman *de bene esse* be made on the 23rd March upon notice to defendants, and to Heughan, who was stated in the order to have been served with a third party notice by defendants.

The examination of Erdman took place on 23rd March the solicitor for the town appearing and cross-examining, but, so far as appears, notice of the examination was not served on Heughan, he not having then in fact been made a party to the suit.

Erdman died on 1st April, 1892, and his widow, having proved his will, began this action on 6th June, 1892, for her own benefit as his widow, and for the benefit of four of his children.

Upon the trial, before Street J., the deposition of Erdman was tendered in evidence and rejected, and there being otherwise no proof of the cause of the injury the plaintiff was non-suited. The non-suit was

set aside and a new trial ordered by the Divisional Court, (Armour C.J. and Falconbridge J.) and such judgment has been affirmed by the unanimous judgment of the Court of Appeal.

Notwithstanding the able argument of Mr. Aylesworth I think that the judgment of the appeal court should be affirmed.

The rule of evidence is thus stated in Taylor on Evidence, sec. 464:

> Where a witness has given his testimony under oath in a judicial proceeding, in which the adverse litigant had the power to cross-examine, the testimony so given will, if the witness himself cannot be called, be admitted in any subsequent suit between the same parties, or those claiming under them, provided it relate to the same subject or substantially involve the same material questions.

And thus, in another work on evidence (Stephen art. 32.)

> Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding..... when the witness is dead, provided (1) the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness; (2) that the questions in issue were substantially the same in the first as in the second proceeding; and (3) that the proceeding, if civil, was between the same parties, or their representatives in interest. (1).

The evidence of Erdman was testimony under oath in a judicial proceeding and (as Mr. Justice Osler points out) was not the less so because taken *de bene esse* and never actually used on the trial of the action in which it was taken.

Subject to the observations to be made respecting the position of the third party it also satisfies the rule that the party against whom it is offered in the present action, viz.: the Corporation of Walkerton, had the right and opportunity to cross-examine the declarant when he was examined as a witness, and in fact exercised the right.

(1) Stephen's Dig. Law of Evidence, p. 44.

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Then as to the second requirement of the rule, viz.: that the questions in issue shall be substantially the same, or (as stated in Taylor) that the evidence relate to the same subject, or substantially involve the same material question, this does not require that all the issues in the two actions shall correspond. It is satisfied if the evidence relates to any material issues that are substantially the same in both actions.

Now the question of fact whether the injury to Erdman (the alleged cause of his death) was occasioned by the negligent act or omission of the town was a material issue in the action brought by him, and it is equally a material issue in the present action, as the plaintiff is bound to show that the death was occasioned by an act or default of the town which gave to Erdman a right of action against the town at the time of his death. And the evidence in question was tendered in support of that issue.

If indeed the admissibility of the evidence were to depend upon the causes of action being the same the respondent could not hope to succeed, because it is conclusively established that the cause of action given by the statute is different from that which the deceased had in his lifetime (1).

In the last named case Lord Selborne says:

> Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim *actio personalis moritur cum personâ*, because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the

(1) *Blake* v. *Midland Railway Co.* 18 Q.B. 92; *Pym* v. *Great Northern Railway Co.* 4 B. & S. 396; *Seward* v. *Vera Cruz* 10 App. Cas. 59.

action, an action which he never could have brought under circumstances which, if he had been living would have given him, for any injury short of death which he might have sustained, a right of action which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various other ways.

Lord Blackburn also says:

I think that when that act (Lord Campbell's Act) is looked at, it is plain enough that if a person dies under the circumstances mentioned, when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived, an action which, as is pointed out in *Pym* v. *Great Northern Railway Co.*, (1) is new in its species, new in its quality, new in its principles, in every way new and which can only be brought if there is any person answering to the description of the widow, parent or child who under such circumstances suffers pecuniary loss by the death.

But while the present cause of action is new and different from that brought in his lifetime by Erdman it is nowhere stated that the causes of action are to be identical in order to render admissible in a later action evidence given in an earlier one.

It is sufficient that material issues to which the evidence is relevant, and for the proof of which it is in each case adduced, are substantially the same in both proceedings. Here the second cause of action embraces what goes to constitute the first together with other things. I conclude therefore that the second requirement of the rule is met.

Then as to the third requirement, viz.: that the proceedings in the two actions shall be between the same parties, or those claiming under them. The plaintiff in this action, although suing as executrix, fills a mere nominal or formal position in the action. As expressed in more than one case the plaintiff so suing is a mere instrument acting on behalf of the person whether widow, child or parent claiming to have sustained

(1) 4 B. & S. 396.

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pecuniary loss through the death of the deceased (1). What has to be regarded, therefore, is the relation which the beneficial parties to the action bear in point of interest to the deceased. Can they be said to claim under him? The statutory right of action requires the concurrence of several things, viz.: a wrongful act of defendant which would in the lifetime of the deceased have entitled him to maintain an action for the injury; the death occasioned by such wrongful act; the existence of a personal relation of wife, parent or child in the person beneficially claiming; and a damage to such person through the death by the loss of some pecuniary benefit reasonably to have been anticipated from the continuance of the life.

In the interpretation of the provision of the statute that the wrongful act causing the death shall be such as would, but for the death, have entitled the person injured to maintain an action, it has been held that this means a right of action subsisting in him down to the time of his death; and that, if previously having a right of action, he released it, or discharged it by accord and satisfaction, the statutory cause of action could not arise upon the death. This is the result of decisions such as *Read* v. *Great Eastern Railway Co.* (2), and is supported by the before quoted observations of Lord Selborne in *Seward* v. *Vera Cruz* (3).

I think it follows upon this that the persons seeking the benefit of this action, the widow and children of Erdman, are in effect claiming through him. They are claiming the benefit of a breach of duty which the defendants owed to Erdman, and so in a substantial sense they ground their action, in an essential condition of it, upon rights which in his lifetime he

(1) *Leggott* v. *Great Northern Railway Co.* 1 Q. B. D. 599.

(2) L. R. 3 Q. B. 555.

(3) 10 App. Cas. 59.

possessed, viz: the right to the exercise towards him of due care, and upon his right of action in his lifetime for breach thereof. Erdman's executor could make no admission against the right of the persons beneficially entitled but Erdman's own acts and admissions in his lifetime would be relevant evidence against the present plaintiff's right of action. One cannot expect to find the analogies complete, and the case before us is new in instance, but in my opinion the effect of the cases as to the injured person's competency in his lifetime to extinguish the present action by release of his own right of action, as well as the consideration that the statute grounds the present right of action in part upon the breach of a duty owed to the deceased, point to the conclusion that the rule of evidence is reasonably and fairly to be extended by analogy to the new relation created by the statute.

I therefore think that the judgment below is correct.

I also agree that the case is not affected by the circumstance of the third party proceedings. The plaintiff may succeed against the town and fail as to Heughan. The town might have made an admission of liability, and this would be admissible evidence against the town but could not bind Heughan. In order to make the third party liable it must be established on the trial, as against him, that the damages were sustained by reason of an obstruction, excavation or opening placed, made, left or maintained by him.

This is not made out as against him by evidence admissible against the town but not against him, although such evidence may establish a case as against the original defendant.

As to the point that notice of the examination of Erdman was by the order of the master required to be served on Heughan as well as on the town, the latter

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was not at the time made a third party. Besides, this point, (as I understand it) is not made by the town. On the contrary, they contend that Heughan, not having been made a party, could not have had the right to cross-examine. Hence the point did not engage the attention of the appeal court, and is not to be given weight to here. But in any view I think it not maintainable.

For these reasons I think the appeal should be dismissed.

Appeal dismissed with costs

Solicitor for appellant: *William A. McLean.*

Solicitors for respondent: *Shaw & Shaw.*

Solicitor for third party: *H. P. O'Connor.*