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WRONGFUL DEATH—BASES OF THE COMMON LAW RULES*

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One of the oft-sung glories of the English common law is the vitality of its many rules which evolved originally from ancient custom, usage, tradition and experience. This truly amazing vitality has the virtue of imbuing the law with stability, of providing legal sanction for established commercial practices, of protecting vested property interests, and of furnishing some measure of predictability of decisions. Unfortunately, it also serves to perpetuate the force of some rules far beyond the period of their usefulness and to maintain their influence after the reason for their existence has been long forgotten.¹ Such was the case in regard to two common law principles which for century after century prevented any recovery of damages for bodily injuries wrongfully inflicted on a person and resulting in his death. These principles, overlapping in their effect and often confused in their application, but not identical, are: (1) *actio personalis moritur cum persona*—a personal action dies with the person (of plaintiff or defendant), and (2) the killing of a human being is not a ground for an action for damages. Due to these two restrictions, when a person died either instantly or after an interval of time as a consequence of the wrongful act or omission of another, the wrongdoer could not be held liable either (1) to the victim's estate for damages sustained by the victim before death or for damages to his estate due to the loss of life, or (2) to third parties with interests in the life of the victim for damages for their losses resulting from his death.² The modern law regarding recovery of damages for wrongful death represents the results of a long judicial and legislative process of qualification, limitation and finally abrogation of these principles.

* This is the first of a series of articles to be published by the author on wrongful death and survival of personal injury actions.

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1. "What may have been the real reason for the establishment of this rule of the common law [denying recovery for wrongful death] we may not be able to discover In that case the rule must be held to be one originally created for some legal reason which in the mutation of things has crumbled away, leaving the rule so crystallized as to be immovable except by legislative power. . . . It is in this sense I think that the rule has been accepted as law in this country." *Grosso v. Delaware, L. & W. R.R.*, 50 N.J.L. 317, 13 Atl. 233, 235 (1888).

2. MCCORMICK, DAMAGES § 93 (1935); 4 SUTHERLAND, DAMAGES 3694 (3d ed. 1904); TIFFANY, DEATH BY WRONGFUL ACT § 1 (2d ed. 1913).

I. ORIGIN OF ACTIO PERSONALIS MAXIM

In spite of the long life and great effect of the rules barring recovery for wrongful death, neither their exact origins nor bases can be definitely fixed. It seems safe to say that the broad maxim *actio personalis moritur cum persona* is the source of the prohibition against recovery, but English legal historians have encountered difficulty in tracing the development of the maxim. Goudy conceded that "though this is one of the most familiar maxims of English law, the veil of obscurity covers not only its origin but its true import and significance";³ and Pollock observed that the rule is "one of some antiquity, but its origin is obscure and post-classical."⁴

Apparently neither Roman law nor Canon law can be blamed for the incorporation of the rule into English common law,⁵ though it is said that a similar concept is to be found in Roman jurisprudence.⁶ Plucknett reports that the principle had medieval origins in England,⁷ but there is no reference to the maxim itself in the writings of Glanville (12th century) or Bracton (13th century).⁸ In the fifteenth century Year Books, several cases are referred to as stating that an executor could not be held liable for a trespass of his testator because the action dies with the person.⁹ But it is commonly believed that the maxim did not gain currency, at least "in its modern shape," until the time of Lord Coke,¹⁰ who quoted it both in cases reported by him and in his writings.¹¹ In the middle of the eighteenth century, Blackstone stated the rule more fully and "in its modern shape": "And in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*; and it never shall be revived either by or against the executors or other representatives."¹²

3. GOUDY, *ESSAYS IN LEGAL HISTORY* 218 (1913), quoted in 3 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 576 (3d ed. 1923). See also PROSSER, *TORTS* 706 (2d ed. 1955).

4. POLLOCK, *TORTS* 63 (13th ed. 1939), quoting Bowen, L.J., in *Finlay v. Chirney*, 20 Q.B.D. 494, 502 (1888).

5. 3 HOLDSWORTH, *op. cit. supra* note 3, at 576; Winfield, *Death As Affecting Liability in Tort*, 29 COLUM. L. REV. 239, 244 (1929).

6. POLLOCK, *op. cit. supra* note 4, at 63. See *Panama R.R. v. Rock*, 266 U.S. 209, 211 (1924).

7. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 376 (5th ed. 1956), referring to III Aethelred 14 (c. 997).

8. Winfield, *op. cit. supra* note 5, at 239-42.

9. 3 HOLDSWORTH, *op. cit. supra* note 3, at 577, citing Y.B. Hil. 11 Hen. 4, pl. 20 (1410) and Y.B. Pasch. 19 Hen. 6, pl. 10 (1440). Y.B. Mich. 18 Edw. 4, pl. 17 (1478), applies this reasoning to a suit for trespass by a representative of the deceased plaintiff. See Winfield, *op. cit. supra* note 5, at 244.

10. 3 HOLDSWORTH, *op. cit. supra* note 3, at 576; Winfield, *op. cit. supra* note 5, at 244-45.

11. *Pinchon's Case*, 9 Co. Rep. 866, 87a, 77 Eng. Rep. 859 (1609); 4 COKE'S *INSTITUTES* 315 (1797). FULBECKE'S *PARALLELE* (1601), NOY'S *MAXIMS* (1641) and WENTWORTH'S *EXECUTOR'S* (1641) all carried statements of the maxim. See Winfield, *op. cit. supra* note 5, at 245-46.

12. 3 BLACKSTONE, *COMMENTARIES* *302.

Though the earlier authorities stated the maxim broadly, and though the term *actio personalis* itself would include other than damages actions sounding in tort, it is agreed that the restrictive principle generally did not extend to contract actions (except contracts to marry) even in its very early application, nor to tort actions for the recovery of possession of chattels or realty.¹³

The reason for the existence of the maxim, like the date of its origin, is the subject of considerable conjecture among legal scholars, some of whom have reached somewhat negative conclusions. Pollock characterized the rule as "one of the least rational parts of our law," and declared that when damages recoveries came to be understood as compensatory rather than punitive in purpose, "the rule *actio personalis moritur cum persona* seems to be without plausible ground."¹⁴ Plucknett discloses his opinion as to the merits of the rule by observing tersely: "Our remarks about this famous brocard can happily take the form of an obituary notice."¹⁵ The Tennessee Supreme Court has declared that "no reason has ever been assigned for the existence of this rule which would satisfy an enlightened court of modern times."¹⁶

At least one scholar suggests that the introduction of the maxim into the English common law may not be attributable to rational bases but rather to "a hasty following of the Roman rule";¹⁷ but differences in the status of human beings under the Roman and English cultures are said to make the uncritical adoption of the Roman rule into the English law unjustifiable.¹⁸ Most legal historians agree that the rule arose mainly from the early confusion of the role of civil damages actions with the punitive aspects of criminal proceedings. Thus, Winfield, searching for the reason for the denial of remedies in tort after one party was dead, concludes:

Perhaps it was the criminal hue that coloured trespass for such a long time. Crime is a very personal matter. Death pays all when the criminal has gone. "The party cannot be punished when he is dead." And even

13. Contracts: *Ibid*; 3 HOLDSWORTH, *op. cit. supra* note 3, at 577; PIGGOTT, *TORTS* 19 (1885); PLUCKNETT, *op. cit. supra* note 7, at 376. Tort actions for the recovery of property: POLLOCK, *TORTS* 52 (15th ed. 1951).

14. POLLOCK, *op. cit. supra* note 4, at 62, 64.

15. PLUCKNETT, *op. cit. supra* note 7, at 376. This observation was made just after the English Law Reform Act of 1934 finally abrogated the rule in England. See Fisher, *Survival of Actions*, 20 *AM. L. REV.* 48, 57 (1886): "The maxim would probably never have acquired such currency if people had not thought that a Latin quotation was an ornament to an opinion or argument."

16. *Harris v. Nashville Trust Co.*, 128 *Tenn.* 573, 582, 162 *S.W.* 584, 586 (1913). "The maxim . . . is by no means a favorite with the courts. It has no champion at this date, nor has any judge or law writer risen to defend it for 200 years past." 128 *Tenn.* at 581, 162 *S.W.* at 586.

17. POLLOCK, *op. cit. supra* note 4, at 63. See also *Van Beeck v. Sabine Towing Co.*, 300 *U.S.* 342, 344-45 (1937); PIGGOTT, *TORTS* 19 (1885).

18. See Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 *L.Q. Rev.* 431, 436-37 (1916).

if he survives, and it is the injured party who has died, surely it is the king and not the representatives who should take up redress.¹⁹

In the same vein, Pollock observed:

At one time it may have been justified by the vindictive and quasi-criminal character of suits for civil injuries. A process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man's estate, an impersonal abstraction represented no doubt by one or more living persons, but by persons who need not be of kin to the deceased. Some such feeling seems to be implied in the dictum, "If one doth a trespass to me, and dieth, the action is dead also, because it should be inconvenient to recover against one who was not party to the wrong."²⁰

So long as the recovery of damages was regarded as a matter of personal vengeance and punishment as between the transgressor and his victim, death erased the purpose of a civil action between them. The legal successor of the deceased party was neither the wronged nor the wrongdoer and had no personal involvement in the wrong. "For neither the executors of the plaintiff have received, nor those of the defendant have committed, *in their own personal capacity*, any manner of wrong or injury."²¹

Some reasons of a more practical nature have been advanced, often rather faint-heartedly, in justification of the operation of the maxim. It is suggested that difficulties of proof may arise from the fact that one of the interested parties is not available to testify as to his side of the case, and that an unjust result may be reached because of the insufficiency of the evidence.²² Also, the successors of a deceased plaintiff cannot actually show that defendant's wrong caused loss to themselves or to the deceased's estate, except on the basis of the unprovable assumption that if the deceased had not died he would have sued on the cause of action, recovered substantial damages, and

19. Winfield, *op. cit. supra* note 5, at 249. The interior quote is from Fineux, C.J., in Y.B. Mich. 12 Hen. 8, pl. 3 (1520). See also PROSSER, *op. cit. supra* note 3, at 706.

20. POLLOCK, *op. cit. supra* note 4, at 63, 64. The interior quote is from Newton, C.J., in Y.B.—19 Hen. 6, pl. 10 (1440).

21. 3 BLACKSTONE, *op. cit. supra* note 12, at 302 (Emphasis added). See also Ellenborough, C.J., in *Chamberlain v. Williamson*, 2 M. & S. 408, 415, 105 Eng. Rep. 433, 436 (1814): "The general rule of law is *actio personalis moritur cum persona*, under which rule are included all actions for injuries merely personal. Executors and administrators are representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate."

22. Winfield, *op. cit. supra* note 5, at 249. But as the author observes, the same difficulty arises where the action is based on a tort against property, to which the maxim did not apply (at least not in England after a statute passed in 1833). And the same observation applies to contract actions, to which the maxim never applied.

retained that recovery as part of his estate until he eventually died.²³ Further, where the injured person is dead and therefore cannot himself be compensated, the measure of damages which would have been proper in an action he would have brought had he lived, may not provide an appropriate amount of compensation for his estate and those succeeding to his assets. All these factors are summed up in a cautious aside in a late edition of an English torts text:

A slender case might be made out for the old law on the ground that, in the absence of the essential parties, it is difficult to ensure that justice is done; and, in the case of the death of the injured party, there is much to be said for the view that the measure of damages ought to change, so far as personal injury is concerned, when there is no longer anyone to compensate. It certainly seems to be a departure from the compensatory basis of the law of civil wrongs to award damages to a person who has not been damaged²⁴

While these latter considerations may carry some weight, the explanation for the development of the maxim apparently lies in the historical factor first mentioned, and thus Pollock's observation is borne out that when the function of damages awards came to be recognized as compensatory rather than punitive, the reason for the rule ceased to exist.

II. ORIGIN OF RULE AGAINST CIVIL ACTION FOR KILLING

Attempts to establish the origin and basis of the companion principle, that no civil action lies for damages for wrongfully causing the death of a person, also leads to some degree of ambiguity and to dependence more on historical considerations than on logical reasons. Though it is frequently assumed that this broad restriction is merely one aspect of the operation of the rule that personal actions die with the person, careful analysis shows that such is not the case. Rather, the rule in its broadest application appears to have been finally confirmed in the common law at a relatively late date, and largely by judicial accident.

Certain it is that at one early stage of English history, something like damages for the killing of a person were payable to the deceased's relatives, as a means of preventing the latter from wreaking vengeance on the killer and his family by a blood feud. Under medieval Anglo-Saxon law this punitive payment, called "wer" or "wergild" ("mans-price" or "man-payment"), was paid by the killer to the kinsmen of the victim, the amount being fixed first by some kind of arbitration and later by an established scale of payments based on the

23. *Id.* at 250: "[Plaintiff's successors] seek to set up a principle consonant neither with abstract justice nor with the law of torts,—that they shall profit by a wrong which in origin did not harm them."

24. Pollock, *op. cit. supra* note 13, at 53, n. 30.

social rank of the deceased. Acceptance of *wergild* put the recipients under obligation not to pursue the feud; and ultimately, as the community's interest in preventing breaches of the peace became dominant, the wrongdoer and the victim's kindred were placed under the respective duties of paying and accepting *wergild* instead of engaging in private war.²⁵ However, it is probable that such payments were conceived of more as punishment for the wrong than as compensation for losses suffered and were imposed by the sovereign as a police measure to preserve the peace rather than as a recognition of legal rights of the deceased's kinsmen.

Even in the later period when the maxim *actio personalis moritur cum persona* was becoming established in the common law, the restriction against recovery of damages for wrongful death was only partially formulated and narrowly expressed.²⁶ Nevertheless, it is not uncommon to find courts indulging in the broad assumption that this restriction originated as a part of the maxim. Thus, the declaration is made in an early Kentucky case: "The cause of action for injuries to the person dies with the person injured, and it follows as a necessary consequence, that the cause of action having itself abated no separate action can be maintained for such damages, as are exclusively consequential."²⁷ The fault of this position is that it assumes too much. True it is that at common law the maxim would apply to preclude an action for damages by the decedent's personal representatives to recover for the losses of the decedent, for in such a case the decedent, through his representative, must be the party plaintiff and his death extinguishes the cause of action. But the death may have caused other losses to third parties who had an interest in the continuance of the life of the decedent—his dependents, who anticipated his support, his creditors, who sought payment of his obligations, his employer, who had a contract right to the benefit of his services, his spouse, who expected to enjoy his companionship, protection and devotion.²⁸ These losses are separate from those sustained by the decedent himself. They provide the bases for independent causes of action for damages, and in respect to these actions the

25. See 1 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 46-48 (2d ed. 1923); 2 HOLDSWORTH, *op. cit. supra* note 3, at 37, 51-52.

26. See *Smith v. Sykes*, 1 Freem. 224, 89 Eng. Rep. 160 (1677); *Higgins v. Butcher*, Yel. 89, 80 Eng. Rep. 61 (1607). The specific rule of these decisions and the reasons therefor are discussed *infra*.

27. *Eden v. Lexington & F. R.R.*, 53 Ky. 165, 167 (1853). See also *St. Louis, I. M. & S. Ry. v. Craft*, 237 U.S. 648, 655 (1915); *Holmes v. O. & C. Ry.*, 5 Fed. 75, 78 (D.C. Ore. 1880); *Green v. Hudson River R.R.*, 28 Barb. 9, 17 (N.Y. 1858).

28. In a few instances the insurer of the decedent has sought (unsuccessfully) to recover damages from the party causing his death, on the theory that the insurer had a pecuniary interest in the continued life of the insured. *Insurance Co. v. Brame*, 95 U.S. 754 (1877); *Connecticut Mut. Life Ins. Co. v. New York & N.H. R.R.*, 25 Conn. 265 (1856).

parties are the wrongdoer and the third party. Neither of them being dead, the rule that a personal action dies with the person has no application.²⁹ However, the failure of counsel and judges in some cases to notice the distinction between the losses of the decedent and the losses of third parties very probably promoted the widespread acceptance of the rule denying recovery for either type of loss.³⁰

Obviously, then, it is necessary to look further for reasons for denying any recovery of damages resulting from the wrongful killing of a person. The search leads back along the dim corridors of the development of English criminal law, and some authors have with some justification despaired of finding a path of logic through the maze of ancient customs. Thus, it has been said: "The reasons assigned for such a rule are not always the same nor are they always satisfactory, and the principle has been recognized by American courts more because of the fact that it is firmly established by precedent than because it is based upon any sufficient reason."³¹ Even judges have been known to indulge in glittering ambiguities when approaching this problem: "It is manifestly not one reason but many, which lie at the basis of the common law rule. Considerations of the most varied and grave character would present themselves to the minds of any court . . . to dissuade them from entertaining any action, sounding in damages and seeking a recovery on account of the destruction of life."³²

Actually, the considerations on which the rule seems to have been originated were neither varied nor grave, but rather were centered in a single technical device in the medieval English criminal law—the doctrine of the merger of a civil wrong in a felony.³³ The relation of this doctrine to the matter of recovery of damages for wrongful death was stated concisely early in the seventeenth century in *Higgins v. Butcher*.³⁴ In that case a husband brought an action for damages

29. The distinction is generally recognized by textwriters, and is sometimes, though not frequently enough, spelled out clearly in judicial opinions. *Shields v. Yonge*, 15 Ga. 349, 354 (1854); *Hyatt v. Adams*, 16 Mich. 180, 188-89 (1867); *Bramwell, B.*, dissenting in *Osborn v. Gillett*, L.R. 8 Ex. 88, 94 (1873); *POLLOCK, TORTS* 66 (9th ed. 1912); *PROSSER, op. cit. supra* note 3, at 709; *SALMOND, TORTS* 392 (11th ed. 1953); *SUTHERLAND, op. cit. supra* note 2, at 3695; *TIFFANY, op. cit. supra* note 2, at §§ 1, 15.

30. See *SALMOND, op. cit. supra* note 29, at 392; 3 *HOLDSWORTH, op. cit. supra* note 3, at 333-35.

31. *BAUER, DAMAGES* 414 (1919). See also, *Holmes v. O. & C. R.R.*, *supra* note 27, at 78: "It is also admitted that the weight of authority in this country is with the English rule. But it is not admitted that the rule is founded in reason or is consonant with justice."

32. *Connecticut Mut. Life Ins. Co. v. New York & N.H. R.R.*, *supra* note 28, at 272.

33. The doctrine apparently developed as a phase of the establishment of the king's power to seize the property of felons and impose the forfeiture of goods, as well as life, to the crown as punishment for such offenses. See 3 *HOLDSWORTH, op. cit. supra* note 3, at 329-33.

34. *Yel.* 89, 80 *Eng. Rep.* 61 (1607).

for an assault on his wife by the defendant. The wife had died the day following the assault as a result of the beating she received, and the husband had thus been deprived of her services, for which loss he sought recovery. Though defendant's counsel argued that the action would not lie because, the tort being personal to the wife, the cause of action died with her, the court did not base its decision for defendant on that ground. Rather, it declared, "if a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence, and private wrong offer'd to the master before, and his action is thereby lost . . ."³⁵ In a similar case decided seventy years later, the same principle was stated even more succinctly: "[I]f A beat the wife of B, so that she dies, B can have no action of the case for that; because it is criminal, and of a higher nature."³⁶ Under this state of the law, if the wrongdoing amounted to a felony, the authority of the sovereign pre-empted the whole case, and no civil right of action could exist.³⁷ And since the unjustifiable killing of a human being nearly always amounted to felonious homicide during the early period under consideration,³⁸ the merger doctrine virtually eliminated the possibility of recovering damages for losses sustained by third parties with an interest in the life of the decedent.

At a later time the doctrine was qualified so that the private wrong was not entirely destroyed by merger into the felony but only suspended until criminal prosecution for the public wrong had been accomplished.³⁹ But this modification had little effect in the wrongful death cases because as long as the punishment for felonious homicide was both execution and forfeiture of property there would be no way to enforce any damages judgment obtained by pursuing the suspended civil cause of action after a successful criminal prosecution. Under such conditions, "an action for the private injury was useless and absurd."⁴⁰ And even at times and in situations in which neither

35. *Ibid.*

36. *Smith v. Sykes*, 1 Freem. 224, 89 Eng. Rep. 160 (1677). See 4 BLACKSTONE, COMMENTARIES *6: "In these gross and atrocious injuries the private wrong is swallowed up in the public . . ."

37. Recognition of this rule as controlling in the English law at the time of *Higgins v. Butcher* and into the nineteenth century is found in many decisions of various courts. See, e.g., *Shields v. Yonge*, *supra* note 29; *Eden v. Lexington & F. R.R.*, *supra* note 27; *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475 (1848); *Hyatt v. Adams*, *supra* note 29; *Grosso v. Delaware, L. & W. R.R.*, *supra* note 1; *Admiralty Comm'rs v. S.S. Amerika*, [1917] A.C. 38 (1916).

38. See *id.* at 45, 46; *HOLDSWORTH*, *op. cit. supra* note 18, at 433.

39. See *HOLDSWORTH*, *op. cit. supra* note 18, at 433-34; *Shields v. Yonge*, *supra* note 29, at 353; *Green v. Hudson River R.R.*, *supra* note 27, at 17; *Wells v. Abrahams*, L.R. 7 Q.B. 554, 557 (1872).

40. *Grosso v. Delaware L. & W. R.R.*, *supra* note 1, at 234. *Hyatt v. Adams*, *supra* note 29, at 185; *White v. Fort*, 10 N.C. (3 Hawks) 251, 263, 265 (1824).

merger nor forfeiture of property were involved, it was still sometimes asserted that as a matter of public policy the civil cause of action should be suspended until after the wrongdoer had been prosecuted for the criminal offense. This policy was intended to persuade injured parties to institute criminal proceedings in order that the public's interest in having the offender punished for his crime should be served.⁴¹ Of course, under this theory of suspension, and absent the practice of forfeiture of property for felony, the common-law restriction against suits by third parties damaged in wrongful death cases logically would not be operative after the criminal prosecution had been completed, either by conviction or acquittal of the accused—and this point was suggested as far back as 1677 by the reporter of *Smith v. Sykes*.⁴² However, by the time suspension had fully replaced merger and the practice of forfeiture of property had been finally abandoned, the rule of law arising out of the existence of merger and forfeiture was so firmly entrenched that the courts generally felt unable to disturb it.⁴³

The *Higgins* and *Smith* cases, decided in the seventeenth century, perhaps originated and certainly clearly evidenced the existence of the common-law rule that when a person was killed under circumstances in which the killing was a felony and in which the Crown's remedy was pre-emptive, no civil cause of action for damages existed. But the authority regularly cited for the proposition that no damages are recoverable for wrongful death is not those cases, but rather *Baker v. Bolton*, decided in 1808, in which Lord Ellenborough, without referring to any authority, declared broadly: "In a civil court, the death of a human being could not be complained of as an injury."⁴⁴

An amazing variety of reactions have been manifested to this case. The decision has been vigorously defended on occasion as stating a rule which "has become inveterate from the earliest time,"⁴⁵ but it has

See 4 BLACKSTONE, *op. cit. supra* note 12, at 6.

41. See *Hyatt v. Adams*, *supra* note 29, at 187: "This is but a suspension of the civil remedy until the offender has been tried for the public offense; and it is based upon grounds of public policy, making it the interest of parties who have suffered the private injury to prosecute the offender, to perform their duties to the public before they seek private redress." See also *Eden v. Lexington & F. R.R.*, *supra* note 27, at 166; *White v. Fort*, *supra* note 39, at 262-66; *Crosby v. Leng*, 12 East. 409, 413, 104 Eng. Rep. 160 (1810) (Ellenborough, C.J.).

42. See note 26 *supra* at 160 n. (a): "But *quaere*, if an action will not lie after the defendant has been criminally prosecuted?"

43. See *Insurance Co. v. Brame*, 95 U.S. 754, 756 (1877); *Green v. Hudson River R.R.*, *supra* note 27, at 15; *Admiralty Comm'rs v. S.S. Amerika*, *supra* note 37, at 41.

44. 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

45. Earl Loreburn in *Admiralty Comm'rs v. S.S. Amerika*, *supra* note 37, at 41. Lord Sumner, in the same case at page 53, said of the decision: "Plainly it was, and long had been, the general opinion among students of the common law that the rule was as stated by Lord Ellenborough."

also been widely criticized as embodying a careless overstatement of the law, made without any supporting authority and induced by confusion of thought.⁴⁶ In connection with his ruling in this case, Lord Ellenborough has been hailed as a great jurist on the one hand⁴⁷ and on the other has been branded as one "whose forte was never common sense."⁴⁸ And while the rule laid down has been deplored as one which unduly restricted the recovery of damages in wrongful death cases,⁴⁹ the decision has also been commended as opening the door to recovery of one item of damages which had not been obtainable previously in such cases.⁵⁰

One can hardly be entirely confident in placing an evaluation on a decision which has been the subject of such widely variant construction, but it seems probable that Lord Ellenborough unwittingly (or, if deliberately, wholly without authority) phrased his rule too broadly and thereby caused the restriction against recovery to be extended to a degree not warranted by the earlier decisions.⁵¹ It must be remembered that *Baker v. Bolton* was a *nisi prius* case, tried in the local court before a single judge rather than en banc in the superior court at Westminster. The case involved only a small amount of money and apparently was not extensively argued. Ellenborough's reported opinion is very brief, and the controversial rule of law was laid down without either sustaining reasoning or supporting

46. See Bramwell, B., in *Osborn v. Gillett*, *supra* note 29, at 96: "This is only a *nisi prius* case No argument is stated, no authority cited, and I cannot set a high value on the case" See also 3 HOLDSWORTH, *op. cit. supra* note 3, at 335: "I should like to suggest, therefore, that when Lord Ellenborough gave his ruling in *Baker v. Bolton* he was the victim of the same confusion of ideas." And SALMOND, *op. cit. supra* note 29, at 393, quoting Holdsworth: "The rule as laid down by Lord Ellenborough is obviously unjust; it is technically unsound because . . . it is based upon a misreading of legal history"

47. Admiralty Comm'rs v. S.S. Amerika, *supra* note 37, at 51, takes note of "the weight of Lord Ellenborough's name (no mean authority even when sitting at *nisi prius* . . .)."; *Green v. Hudson River R.R.*, *supra* note 27, at 16, observes that though the decision was made at *nisi prius*, "it has the sanction of the great name of Lord Ellenborough."

48. PROSSER, *op. cit. supra* note 3, at 709. See Lord Sumner's opinion in Admiralty Comm'rs v. S.S. Amerika, *supra* note 37, at 51, referring to "Lord Campbell's sneer" against Lord Ellenborough.

49. See HOLDSWORTH, *op. cit. supra* note 18, at 434-35, and discussion in the text following note 51 *infra*.

50. *Hyatt v. Adams*, *supra* note 29, at 189. The basis of this peculiar evaluation is that Ellenborough ruled that the husband could recover damages for losses suffered because of his wife's injury, *from the time of the injury to the time of the death*, whereas the Michigan court understood that prior cases had prohibited *any* action for damages for a wrongful act which caused death.

51. The most persuasive criticism of the *Baker v. Bolton* rule is presented by HOLDSWORTH, *op. cit. supra* note 3, at 331-36, and Holdsworth, *op. cit. supra* note 18. The other side of the argument is best stated in Admiralty Comm'rs v. S.S. Amerika, *supra* note 37. However, one of the proponents himself concedes that the rule of the case may appear anomalous to "the scientific jurist," and that it must be explained on "historical grounds." *Id.* at 50. See Rose v. Ford, [1937] A.C. 826, 834, deploring the "illogical doctrine of *The Amerika*."

authority. Under the circumstances it is understandable how the judge could have stated his ruling incautiously so that it declared absolutely that no action for damages could arise from the death of a person. This overstatement may have resulted either from confusion concerning the affect of the maxim *actio personalis moritur cum persona* or from unwarranted assumptions regarding the merger doctrine.

As to the first explanation, it is to be noted that the maxim should not apply to the *Baker* case because the plaintiff was the decedent's husband suing for damages for his own losses caused by the wife's death. Neither party to the action was dead. However, since the plaintiff was the closest relative of the decedent, he was probably her administrator also, and thus was the proper party to sue for decedent's own losses sustained from the wrongful death, which action would of course be barred by the maxim. In the haste of deciding a briefly argued and seemingly insignificant case, the court may easily have thought of the action as being of the latter nature and therefore not maintainable under a common law rule of several centuries' standing.

The second possibility is even more credible. The earlier *Higgins* and *Smith* cases had established the law as denying a civil remedy to a third person who suffered loss as a result of a killing which amounted to felonious homicide. Notice carefully, as Lord Ellenborough may not have done, that in both opinions the denial of remedy was predicated on the wrongdoing being "an offense of the Crown," a "felony," a "criminal" act. Without such a wrongdoing, the doctrine of merger would obviously not operate because if the act causing the death was justifiable or constituted only a misdemeanor the sovereign's power to execute the killer and cause a forfeiture of his property could not be invoked. In the *Baker* case, the wife's death resulted from the negligent driving of a stagecoach in which she was a passenger; and there is no indication that the wrong amounted to a felony by the driver, or, if it did, that the owners of the coach line against whom the suit was brought would be responsible under the criminal law for the driver's conduct.⁵² Furthermore, it is doubtful whether the merger doctrine was still in effect so as to destroy a civil cause of action in England by 1808.⁵³ The opinion in the *Baker* case contains no reference to either of these factors, and the suspicion is thus

52. See *Hyatt v. Adams*, *supra* note 29, at 190; *Grosso v. Delaware, L. & W. R.R.*, 50 N.J.L. 317, 13 Atl. 233, 234 (1888); *Osborn v. Gillett*, *supra* note 29, at 92, 100.

53. SALMOND, *op. cit. supra* note 29, at 392: "The latter rule seems to be based in so far as it refers to inability to recover for the loss of services by the infliction of death on the principle that a trespass is merged in a felony, a reason inadequate in Lord Ellenborough's time, and now obsolete." (Emphasis added). See *Rose v. Ford*, *supra* note 51, at 834. The civil remedy may have been suspended until a criminal prosecution for the felony had been completed. See HOLDSWORTH, *op. cit. supra* note 3, at 332-33.

warranted that the case was decided wrongly and that the rule recited was a mistaken application of the narrower rule adopted in the *Higgins* case on different facts and under different conditions.

As has been indicated, a number of English authorities have questioned the accuracy of the rule in the *Baker* case; but the English courts followed it, apparently without deviation, until later statutes intervened to alter the law. In America a few early cases ignored or repudiated the restriction against recovery of the losses of third parties resulting from wrongful deaths,⁵⁴ but these decisions were largely discredited and the state and federal courts generally acquiesced in the broad proposition that "at common law, no civil action could be maintained for the death of a human being, caused by the wrongful act or negligence of another, or for any damages suffered by any person in consequence of such death . . ." ⁵⁵ However, though the rule was accepted, the opinions often noted that the reasons for the creation of the rule—even if they may have been sound in England at one time—could not rationally be applied in American jurisprudence in the nineteenth century. In some instances, the mere fact of the apparently long existence of the rule as settled law was accepted as justification for its continued application to later cases;⁵⁶ but some courts felt it necessary to seek other bases for sustaining an established rule which had been deprived of its original support by political developments and the passage of time. While engaged in this process, a Michigan judge, referring to the merger doctrine as the basis for the denial of recovery of damages in a wrongful death case, made an observation so pointed as to have since pierced the heart of many a law teacher: "But this reason thus nakedly stated, resting upon artificial distinction rather than any real principle, and savoring more of

54. *Sullivan v. Union Pac. R.R.*, 23 Fed. Cas. 368 (No. 13,599) (C.C. Neb. 1874) (discredited by *Insurance Co. v. Brame*, *supra* note 28); *Cross v. Guthery*, 2 Root 90 (Conn. 1794) (ignored by court in reaching contrary result in *Connecticut Mut. Life Ins. Co. v. New York & N.H. R.R.*, *supra* note 28); *Shields v. Yonge*, *supra* note 29 (approved by *Chick v. Southwestern R.R.*, 57 Ga. 357 (1876) and *McDowell v. Georgia R.R.*, 60 Ga. 320 (1878)); *Ford v. Monroe*, 20 Wend. 210 (N.Y. 1838) (overruled by *Green v. Hudson River R.R.*, *supra* note 27). See 1 JAGGARD, TORTS 327 (1895); TIFFANY, DEATH BY WRONGFUL ACT §§ 6-11 (2d ed. 1913).

55. *Hyatt v. Adams*, *supra* note 29, at 185.

56. See, e.g., *Grosso v. Delaware, L. & W. R.R.*, *supra* note 52, at 236: "[T]he rule has become so solidified that whatever its original reason was, and however such reason may have ceased to exist, it cannot be judicially disregarded or annulled, but, if injurious, its further modification must be sought from legislative action." *Green v. Hudson River R.R.*, *supra* note 27, at 15: "But I suppose the question has been too long settled, both in England and in this country, to be disturbed, and that it would savor somewhat more of judicial knight errantry, than of legal prudence, to attempt to unsettle what has been deemed at rest for more than two hundred and fifty years." Note that this case was decided in 1858, only fifty years after Lord Ellenborough created the rule referred to; the court, however, assumed that it was applying the rule dating back to the *Higgins* case in 1607. *Carey v. Berkshire R.R.*, 55 Mass. (1 Cush.) 475, 478 (1848).

the verbal logic of the schoolmen than of justice or common sense, has not proved satisfactory . . ."⁵⁷

Unwilling to repudiate an established rule of law, but unsatisfied with the historical bases for the rule, resourceful American judges created several popular rationalizations for the refusal to recognize any cause of action for damages for wrongful death. Some opinions express something in the nature of moral compunctions against awarding damages for loss of life. This approach is best presented in the Michigan case of *Hyatt v. Adams*, decided in 1848:

[T]he reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard, a repugnance which seems to have been strong and prevalent among nations in proportion as they have been or become more enlightened and refined, and especially so where the Christian religion has exercised its most beneficent influence, and where human life has been held most sacred. Among barbarous and half civilized nations, it has been common to find a fixed and prescribed standard of value or compensation for human life, which is often found to be carefully graduated by the relative importance of the position in the social scale which the deceased may have occupied. While this has been the natural result, it has at the same time been, to some extent, the *cause* of their inhuman customs, their barbarous manners and social degradation, and of the comparatively low estimate in which human life has been held among them.

To the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting . . ."⁵⁸

This may seem like strange talk in the light of the fact that civilized, Christian England had adopted Lord Campbell's Act two years earlier to provide for recovery for dependents of persons killed by the wrong of another, that Massachusetts and even Michigan already had statutes granting similar rights in certain situations, and that all American states would soon thereafter enact legislation similar to Lord Campbell's Act. Nevertheless, other American courts echoed the same sentiments. Thus, a Connecticut court took occasion to deny that "death was a proper subject of pecuniary remuneration," and asserted that "from the nature of things" there could be no claim for damages "in the right of the deceased."⁵⁹ Both the New Jersey and Ohio courts endorsed the proposition that "it is inconsistent with the policy of the law to permit the value of human life to become the subject of judicial computation . . ."⁶⁰

57. *Hyatt v. Adams*, *supra* note 29, at 185.

58. *Id.* at 191-92.

59. *Connecticut Mut. Life Ins. Co. v. New York & N.H. R.R.*, *supra* note 28, at 272.

60. *Grosso v. Delaware, L. & W. R.R.*, *supra* note 52, at 235; *Worley v. Railroad Co.*, 1 Handy 481 (Ohio 1855).

What is perhaps a variation of this reasoning was urged on the court in

In other instances courts have shifted their emphasis from principle to practicalities by asserting that the impossibility of calculating the pecuniary value of a life is the reason for denying recovery in wrongful death cases.⁶¹ Since there was no logical basis for estimating in dollars and cents the losses sustained, the jury could not be allowed to make any award of damages, and so the law ought not to recognize the existence of any such cause of action since it could only be prosecuted to futility. The thought is stated graphically, though from a somewhat oblique angle in an early Connecticut case: "[F]or an injury of such incalculable extent, writers on jurisprudence, perhaps without strict accuracy, have assigned the awful magnitude of the wrong as the reason why neither court nor jury have ever been trusted by the law with the function of estimating it."⁶² But while this became a favorite rationalization for the rule, it was criticised on occasion by both courts and textwriters. A New York judge characterized this reasoning as "much more fanciful than sound, since there are many wrongs, for the redress of which an action is given, but which the instinctive sense of mankind declares are incapable of being measured by any pecuniary standard which can do more than approach to a compensation."⁶³ And Pollock observed that courts relying on this basis for the rule were in effect declaring that "because the compensation cannot be adequate there shall be no compensation at all."⁶⁴

The extreme breadth of the liability which might be imposed on the wrongdoer has been cited in justification of the denial of any cause of action for wrongful death. The appalling plight of the tortfeasor has been presented in fervent terms in a Connecticut case:

[I]f a suit should be brought to recover for the mental suffering, loss of society, comfort, support and protection resulting from the death of another person, we should see at once, so intertwined is the web of human affection, interest, and relationship, that the author of his death, however slight or accidental his default, would be responsible in numberless actions brought on behalf of wives, children, friends, brothers, sisters and dependents of all degrees, to say nothing for the present of creditors

[As to recovery for loss of services contracted for] such are the compli-

Osborn v. Gillett, *supra* note 29, at 90: "The policy of the law refuses to recognize the interest of one person in the death of another." Pollock observed that this reasoning would serve to make life insurance and leases for lives illegal. Pollock, *supra* note 29, at 66.

61. See *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 344-45 (1937); *Van Amburg v. Vicksburg, S. & P. R.R.*, 37 La. Ann. 650, 651 (1885); *Green v. Hudson River R.R.*, 28 Barb. 9, 17, 18 (N.Y. 1858).

62. *Connecticut Mut. Life Ins. Co. v. New York & N.H. R.R.*, 25 Conn. 265, 273 (1856).

63. *Green v. Hudson River R.R.*, *supra* note 61, at 18.

64. POLLOCK, *TORTS* 66 (9th ed. 1912). 1 JAGGARD, *op. cit. supra* note 53, at 328, characterized the "public policy" arguments as "all unsatisfactory, if not absurd, reasons."

cations of human affairs, so endless and far-reaching the mutual promises of man to man, in business and in matters of money and property, that rarely is a death produced by a human agency, which does not affect the pecuniary interest of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men, by which the death of either through the involuntary default of others, might be made a source of splendid profits to the other, and would also invite a system of litigation more portentous than our jurisprudence has yet known.⁶⁵

The Michigan court, perhaps tacitly conceding that the absolute rule against recovery works injustices in individual cases, was similarly convinced that if the door should be opened to any recovery, intolerable excesses would follow. "If the principle [of a right to damages for wrongful death] be once admitted, who shall prescribe its limits, and can any limits be prescribed which would not be purely arbitrary?"⁶⁶

III. CONSEQUENCES OF THE RULE

Regardless of whether any of these factors, historical, political, moral or practical, can be accepted as reasonable justifications for the total denial of causes of actions for damages for wrongful death,⁶⁷ the English and American courts almost unanimously acquiesced in the rule until nineteenth century legislation began its eventual elimination from Anglo-American common law. The negative consequences of the application of the rule, already noted in passing, were very broad and, judged by present standards, very harsh.

The portion of the rule based on the maxim *actio personalis moritur cum persona* barred any action by the deceased's personal representative to recover, on behalf of the estate, damages caused by the injury and death inflicted by the wrongdoer. This restriction operated regardless of whether the action was instituted prior to the injured party's death. If no suit had yet been filed, the death destroyed the cause of action; if suit had already been filed, the death of the plaintiff anytime prior to the rendition of judgment caused the suit to abate and be subject to dismissal. The maxim also applied to the death of either party, and so if the defendant died while the plaintiff was still alive suit could not be brought or continued against his estate. The maxim operated regardless of whether the death of the

65. Connecticut Mut. Life Ins. Co. v. New York & N.H. R.R., *supra* note 62, at 272-73, 274. See also Hyatt v. Adams, 16 Mich. 180, 196-97 (1867); Grosso v. Delaware, L. & W. R.R., *supra* note 52, 13 Atl. at 235.

66. Hyatt v. Adams, *supra* note 65, at 197.

67. 1 JAGGARD, *op. cit. supra* note 54, at 328: "None of the many reasons assigned for the rule has been generally accepted as satisfactory . . . The rule is barbarous, and rests on adjudication, in fact."

injured party resulted from the injuries inflicted by the wrongdoer or from an entirely separate and independent cause. If the plaintiff died from natural causes or from the wrong of a third person, the right to recover for his original injuries died with him. The maxim applied both to the damages arising from the loss of life and to the damages sustained between the time of the injury and the death, such as medical expenses, physical suffering and mental anguish. The cause of action which had already accrued for these latter damages was also extinguished by the death.

The portion of the rule based on the *Baker v. Bolton* proposition barred any action by a third party to recover damages for losses he sustained as a result of the victim's death. Thus, relatives and dependents of the victim were left without any right of recovery for loss of support, contributions, society, protection, guidance or comfort which they naturally expected to receive from the decedent; nor could they recover damages for the grief and mental anguish or even physical sickness resulting from their bereavement. Creditors of the deceased whose chances of ever obtaining repayment were destroyed by the termination of the debtor's earning capacity had no right of action against the wrongdoer for thus damaging their pecuniary interests. Insurers of the life of the deceased who were required to make premature payments under the policies could not recover for this financial loss. Persons with a legal right to the valuable services of the deceased were left without any remedy against the wrongdoer whose acts prevented them from receiving those benefits—parents of a minor decedent, or employers or others with contract rights to the services of an adult decedent.

IV. LIMITATIONS ON THE RULE

While these phases of the rule were almost universally applied at common law, a few limitations placed on their scope of application by the courts may be noted. Lord Ellenborough himself clarified one such limitation by ruling that, though a man whose wife was killed could not recover from the killer for loss of services caused by the wife's death, he could recover for services lost between the time of the injury and the death subsequently resulting from the injuries.⁶⁸ Thus, it was not true that the common-law rule "forbade any action for the *act or negligence* which produced death," as was sometimes contended.⁶⁹ Ellenborough's ruling was later applied to allow recovery by a father for the loss of services of his minor child between the injury and consequent death;⁷⁰ and the same result would follow

68. *Baker v. Bolton*, *supra* note 44. See *Eden v. Lexington & F. R.R.*, 53 Ky. 165, 167 (1853).

69. See *Hyatt v. Adams*, *supra* note 65, at 184-85. (Emphasis added).

70. *St. Louis, I. M. & S. R.R. v. Craft*, 237 U.S. 648, 655 (1915); *Mayhew v. Burns*, 103 Ind. 328, 2 N.E. 793, 794 (1885).

in regard to a master's right of recovery for loss of services of a servant. Similarly, the father or husband was allowed to recover for medical expenses incurred in caring for the child or wife in the interval between injury and death.⁷¹ In none of these situations is the recovery for losses resulting from the death of the victim, but rather for the losses resulting from the injury of the victim and accruing to the plaintiff prior to the death.

A second limitation, accepted by the English courts, though not unanimously in the United States, is that the *Baker* case rule does not apply to actions brought on a breach of contract theory, but only to "cases of pure tort."⁷² This view was applied to sustain the action in *Jackson v. Watson & Sons*,⁷³ in which a husband sued for damages for breach of implied warranty of canned food which defendant sold as fit for human consumption but which poisoned plaintiff's wife and caused her death. In addition to medical and funeral expenses, plaintiff claimed damages for loss of his wife's services after her death and was awarded a substantial sum on the latter basis. The Court of Appeal unanimously affirmed the judgment for plaintiff, holding that Lord Ellenborough's ruling "only applies to cases where the cause of action is the wrong which caused the death and does not apply to cases where there is a cause of action independently of such wrong."⁷⁴ Here plaintiff had, in defendant's breach of warranty, a cause of action wholly independent from the death of his wife, and so the death was not the basis of the suit but entered the case only as an element in ascertaining the damages. Though the *Jackson* decision has received some attention in the textbooks as limiting the *Baker* rule, it is not so often noted that three years prior to that decision a New York court in *Duncan v. St. Luke's Hospital*⁷⁵ had rejected the same reasoning, holding that the restriction against recovery of damages for wrongful death cannot be evaded by bringing suit on a breach of contract theory. Through defendant-hospital's negligence, plaintiff's wife had jumped from a window and been killed while a patient in the hospital. Plaintiff sued for damages for the loss of his wife's comfort, affection and services, alleging that these damages had been sustained because of defendant's breach of contract to care for the wife while she was a patient. The court dismissed the complaint, declaring:

There seems to be no difference between the negligent breach of this contract as alleged and the negligent breach of the contract of a common

71. *St. Louis, I. M. & S. R.R. v. Craft*, *supra* note 70 (child); *Mayhew v. Burns*, *supra* note 70 (child); *Hyatt v. Adams*, *supra* note 65 (wife).

72. See SALMOND, *TORTS* 393 (11th ed. 1953).

73. [1909] 2 K.B. 193.

74. *Id.* at 202. See POLLOCK, *TORTS* 54 (15th ed. 1951).

75. 113 App. Div. 68, 98 N.Y.S. 867 (1906), *aff'd per curiam*, 192 N.Y. 580, 85 N.E. 1109 (1908).

carrier to safely transport the passenger. In each case there is a contract, and in each case there is a tort. But the action for such a breach is *ex delicto*, and not *ex contractu*.

. . . .

Nor can we see any reason why there should be any difference in the rule where the tortious act which caused death is alleged to be a breach of an express contract than where it is alleged to be a breach of an implied contract, or where no contractual relation at all existed.⁷⁶

Just as the *Jackson* case rejects the operation of the *Baker* rule in actions for breach of contract resulting in death, so does another celebrated English case, *Bradshaw v. Lancashire & Yorkshire Ry.*,⁷⁷ exclude the application of the maxim *actio personalis moritur cum persona* in such cases. Of course, the maxim has never been thought to apply to contract actions generally, but only to those of a personal nature such as contracts of marriage. And so after *Bradshaw* had been injured in a railway accident and subsequently died from the injuries, his personal representative was careful to base his suit against the railroad on a breach of the contract to carry *Bradshaw* safely; but the damages sought were for the medical expenses and the lost earnings of the decedent between the time of his injury and his death. Though defendant contended that the suit was actually for damages for personal injuries, and so died with the injured party, the court allowed the full recovery sought, declaring: "Whatever may be the usual form of action in such cases, it is quite clear that the declaration in this case was framed in contract. The damage alleged was damage to the estate of the testator"⁷⁸ A few years later the Kentucky court, in a similar action brought by the deceased's administrator against a railroad company, sanctioned a right of action for damages for the pain and suffering of the injured party prior to his death on the reasoning that since the suit was "framed in form *ex contractu*" death did not terminate the cause of action.⁷⁹ Applying the same line of reasoning to a slightly different situation, an English court allowed a husband's administrator to bring suit for injuries that the defendant-railroad had caused the wife to suffer prior to the husband's death. The damages claimed were for medical expenses and the loss of services of the wife while she was injured, but the court observed: "It is clear that this action is in substance one of contract [of safe carriage] Now here there has been a breach of contract,

76. *Duncan v. St. Luke's Hospital*, *supra* note 75, 98 N.Y.S. at 869, 871.

77. L.R. 10 C.P. 189 (1875).

78. *Id.* at 193.

79. *Winnegar's Adm'r v. Central Passenger Ry.*, 85 Ky. 547, 4 S.W. 237 (1887): "The fact that the injury finally resulted in the death of the intestate did not destroy the right of action on the contract, or for the tort growing out of it; for without the contract no liability would exist against the company. . . . At common law, torts to the person survived when the action could be framed in form *ex contractu*." 4 S.W. at 240. The *Bradshaw* case, *supra* note 77, was not cited.

which has caused a loss”⁸⁰ However, this device for circumventing the common law maxim was decisively rejected in a New Hampshire case in which a patient brought suit against a physician for damages for pain and suffering caused by the breach of contract to provide treatment for a broken leg. The physician having died, the issue was whether the cause of action would survive against his administrator. The court determined that “whether a cause of action survives or not does not mainly depend on the form of the remedy, as on a tort or contract, but rather whether the damage is purely personal, not affecting real or personal property.”⁸¹ Since the loss claimed here was of a personal nature, the court concluded that so far as the application of the maxim *actio personalis moritur cum persona* is concerned the case was not distinguishable from breach of marriage contract cases.

At a much earlier date the maxim had also been discarded in certain cases in which one person had wrongfully obtained possession of another’s property. As early as 1583, it was held that the rightful owner of the property could sue the deceased wrongdoer’s personal representative for damages where the wrong had resulted in a benefit to the wrongdoer’s estate.⁸² According to a modern statement, an action would lie, regardless of the death of either party, (1) in detinue to recover personal property, or (2) in ejectment to recover possession of realty, or (3) in indebitatus assumpsit, on a fictitious contract, for the monetary gains accruing to the wrongdoer from the use of the property.⁸³

It may well be true that these qualifications to the common-law rules barring recovery were based less on reason than on a desire to evade the effect of the rules whenever possible, for the rules were the subject of widespread criticism for many years prior to their eventual legislative abrogation.⁸⁴ Pollock characterized the maxim *actio personalis moritur cum persona* as “a rule which has been made at all tolerable for a civilized country only by a series of exceptions,” and pointed out that its effect was to benefit the wrongdoer or the

80. *Potter v. Metropolitan Dist. Ry.*, 30 L.T.R. (n.s.) 765 (Ex. 1874).

81. *Vittum v. Gilman*, 48 N.H. 416, 417 (1869).

82. See *Henry Sherrington’s case*, Sav. 40, 123 Eng. Rep. 1000 (C.P. 1583). See *Vittum v. Gilman*, *supra* note 81, at 416: “[I]f the offender acquires no gain to himself at the expense of the sufferer, as by beating or imprisoning a man, or by slander, the cause of action does not survive; but if by the wrong, property is acquired by the wrong-doer whereby his estate is benefited, an action in some form will lie against the executor to recover the value of the property; as if the testator had converted the property wrongfully taken into money; or the property came in specie into the hands of the executor; [citing American cases]”; *Phillips v. Homfray*, 24 Ch. D. 439 (1883); 3 *HOLDSWORTH, A HISTORY OF ENGLISH LAW* 579 (3d ed. 1923).

83. *POLLOCK, op. cit. supra* note 74, at 52.

84. See generally *Voss, The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 *TUL. L. REV.* 201, 203-05 (1932).

residuary legatee of his estate by depriving the victim or his estate of redress for the wrong done.⁸⁵ As long ago as 1657, a demand was made for legislation to revise the rule that no civil action lies for the wrongful killing of a human being, in order to allow the widow and children of the victim to recover damages for their losses arising from his death.⁸⁶ Then, as now, the logic of allowing damages for a slight personal injury but denying damages for a killing, was questioned.⁸⁷ This anomaly was subsequently dramatized by the grisly humor of the facetious reports that the early railroads took precautions to insure that passengers would be killed rather than merely injured in case of a train wreck.⁸⁸ Further, the recognition of a right of action *ex contractu* in the common carrier cases created a second anomaly: If a man's wife was killed due to the railroad's negligence while she was a passenger, no recovery could be obtained at common law if she had purchased her own ticket; but if the husband had bought the ticket for her, he could recover damages by suing for breach of contract of carriage.⁸⁹

In view of their uncertain origin, their lack of logical bases, and the harsh results they produced, one may well wonder how these restrictive rules could have so long endured. Nevertheless, the demand for legislative reform in this field was stoutly resisted until well into the nineteenth century, and these deeply entrenched principles finally yielded only under the pressure of a transportation revolution so drastic that it required revisions in the economic, social and even legal institutions of the Anglo-American sphere.⁹⁰

85. POLLOCK, *TORTS* 64-65 (13th ed. 1929).

86. See Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 433 (1916), quoting a publication of William Shepherd, entitled "England's Balme," at 148: "[I]t is an hard law that no recompense is given to a man's wife or children for killing of him, whereas for the beating or wounding of him while he was alive, he should have had recompense for the wrong."

87. *Ibid.*; PROSSER, *TORTS* 710 (2d ed. 1955): "The result was that it was more profitable for the defendant to kill the plaintiff than to scratch him." *Van Amburg v. Vicksburg, S. & P. R.R.*, *supra* note 61.

88. *E.g.*, that Pullman passengers were carefully made to recline with their heads toward the front of the train, and that an ax was placed in each car so that trainmen would have a handy instrument for terminating the liability of the railroad to those injured in an accident. See PROSSER, *op. cit. supra* note 87, at 710.

89. See SALMOND, *TORTS* 393 (11th ed. 1953).

90. The coming of the railroad was apparently the motivation for statutes such as Lord Campbell's Act (1846), modifying the rule against recovery for wrongful death. See *Hyatt v. Adams*, 16 Mich. 180, 192 (1867). And "the ravages of the automobile" are credited with having stimulated the passage of the Law Reform Act of 1934, abrogating the maxim *actio personalis*. See PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 378 (5th ed. 1956). The significance of the accident experiences of the early railroads in bringing about both survival and wrongful death legislation in the American states is indicated by the fact that nearly all of the early cases brought under this legislation were to recover damages for deaths caused by the negligent operation of trains. See especially the Tennessee cases, as reviewed in *Davidson Benedict Co. v. Severson*, 109 Tenn. 572, 72 S.W. 967 (1903).