JAMES BURNS CAIRNEY, AN INFANT (*Plaintiff*) ..... APPELLANT;

AND

ROBERTA BURRELLS MacQUEEN (*Defendant*) ..... RESPONDENT.

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*Feb. 22, 23
*May 24

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Aeronautics—Crash of airplane—Death of passenger and pilot—Whether action lies against estate of tortfeasor—Limitation period—Families Compensation Act, R.S.B.C. 1948, c. 116—Administration Act, R.S.B.C. 1948, c. 6—Interpretation Act, R.S.B.C. 1948, c. 1.

The pilot of a plane and his passenger were both killed when the plane crashed. It was not known which of the two died first or if they both died at the same moment. The appellant, a dependant of the passenger, sued under the *Families Compensation Act* (R.S.B.C. 1948, c. 116) the administratrix of the estate of the pilot pursuant to s. 71 of the *Administration Act* (R.S.B.C. 1948, c. 6). The action was brought after the six months after the death of the pilot (the period limited by s. 71 of the *Administration Act*) but within the twelve months from the death of the passenger (the period limited by s. 5 of the *Compensation Act*).

The trial judge held that the appellant had a cause of action against the administratrix and that the action was not statute-barred. This judgment was reversed by a majority judgment in the Court of Appeal.

Held (Locke and Cartwright JJ. dissenting): That the appeal should be dismissed.

Per Kerwin C.J.: The definition of "person" in s. 3 of the *Families Compensation Act* as "the person who would have been liable if death had not ensued" does not apply to the personal representative of the deceased tortfeasor notwithstanding s. 24 of the *Interpretation Act*.

Per Rand J.: If the pilot's death had occurred first, then by force of s. 71(3) of the *Administration Act*, there accrued at that moment to the then living passenger a right of action against the legal representative of the deceased pilot and that representative would, upon the death of the passenger, become liable to the beneficiaries of the passenger under s. 4 of the *Compensation Act*. On the other hand, if the pilot survived the passenger it would be against him that the passenger, at the moment of his death, had the right of action and it would also be against the pilot only that the right of the beneficiary would lie: on the death of the pilot the right would, under the well-established rule of the common law, come to an end and there is nothing in s. 71 which affects that result. The governing point of time in each case is that of the passenger's death. If both had died at the same moment there is no presumption of law either as to survival of the one or other or as to death of both at the same moment. As the pilot may have

*PRESENT: Kerwin C.J., Rand, Kellock, Locke and Cartwright JJ.

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survived the passenger, the presumption of either of the other two possibilities is excluded and with it the possibility of finding that the person liable was the legal representative of the pilot.

Per Kellock J.: The new right of action, created by the *Families Compensation Act*, abates upon the death of the tortfeasor where the latter survives the victim and there is nothing in the Act which prevents that result or allows a person suing under that statute to invoke the provisions of the *Administration Act* although the victim himself might have done so. The law does not permit the context of s. 3 of the *Families Compensation Act* to apply so as to permit action to be taken against the personal representative of the tortfeasor.

Per Locke J. (dissenting): In applying s. 3 of the *Families Compensation Act*, the question is who the person wronged could have sued in respect of his injuries had he lived. Against such person, whether the wrongdoer or his personal representative, the action lies at the suit of the personal representative of the one who was wrong on behalf of the dependents, or by the dependents on their own behalf. Consequently, the passenger, if alive, might by virtue of s. 71(3) of the *Administration Act* have sued the pilot if he were alive and, if dead, his personal representative, and accordingly this action lies. The fact that there is no evidence to prove when in relation to the death of the passenger the death of the pilot occurred does not affect the matter.

S-s. 6 of s. 71 of the *Administration Act* excludes the limitation of six months of s-s. 3, and accordingly the action was not barred (*B.C. Electric* v. *Gentile* [1914] A.C. 1034 referred to).

Per Cartwright J. (dissenting): The word "person" in s. 3 of the *Families Compensation Act* is to be extended by virtue of s. 24(31) of the *Interpretation Act* to read "the heirs, executors, administrators or other legal representatives of such person". It follows that the limitation of six months imposed by s. 71(3) of the *Administration Act* has no application to the present action.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing, Robertson J.A. dissenting, the judgment at trial.

W. S. L. Young for the appellant.

C. W. Tysoe, Q.C. and *Mrs. W. A. Tysoe* for the respondents.

THE CHIEF JUSTICE:—The plaintiff in these proceedings is James Burns Cairney, an infant, sueing by Jeanette Cairney, his mother and next friend, and by special leave of the Court of Appeal for British Columbia he appeals from a judgment of that Court dismissing his action. It was originally brought against Queen Charlotte Airlines Ltd. and Roberta Burrells MacQueen, Administratrix of the estate of Douglas Duncan MacQueen. According to

(1) [1955] 1 D.L.R. 762; 14 W.W.R. 301.

the Statement of Claim the Plaintiff's father, Henry Michael Cairney, was being carried as a passenger for compensation on October 17, 1951, in an aircraft owned by the Company and piloted by its employee, Douglas Duncan MacQueen, on a flight in the Province of British Columbia, when the aircraft crashed, as a result of which all aboard including the pilot were killed. It is alleged that the crash was caused and occasioned by the negligence of MacQueen and the Company. The Provincial Workmen's Compensation Board determined that the right to bring the action against the Company was taken away by Part I of *The Workmen's Compensation Act* and the action as against it was therefore forever stayed.

After the Statement of Defence of the Administratrix had been delivered a case was stated on behalf of her and the plaintiff which, after pointing out that the Writ of Summons had been issued on May 2, 1952, that is, after the expiration of six months from the death of Douglas Duncan MacQueen, although within twelve months after his death, posed the question for the opinion of the Court as to whether the action was maintainable against the Administratrix. Wilson J. before whom the matter came in the first instance decided that the period of limitation applicable was the twelve months mentioned in *The Families' Compensation Act,* R.S.B.C. 1948, c. 116, and not the six months mentioned in *The Administration Act,* R.S.B.C. 1948, c. 6. Upon the argument of an appeal to the Court of Appeal for British Columbia it appeared that a wider point of law was involved and at the Court's suggestion and by consent of counsel for both parties the appeal was adjourned so that a supplemental special case might be submitted to Wilson J. This was done, the question for the opinion of the Court being

> . . . whether, apart altogether from the fact that this action was not brought until after the expiration of six months from the death of Douglas Duncan MacQueen, this action is maintainable against the Defendant Roberta Burrells MacQueen, Administratix of the Estate of Douglas Duncan MacQueen, deceased, it having been brought by the Plaintiff in his individual capacity and against the personal representative of the alleged tortfeasor.

Wilson J. considering himself bound by a previous decision of Fisher J. in *Bowcott* v. *Westwood* (1), answered the

(1) [1937] 1 W.W.R. 657; 51 B.C.R. 441.

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question in the affirmative and ordered the action to proceed to trial against the Administratrix. The appeals from the two Orders of Wilson J. then came on for argument before the Court of Appeal at the same time and by a majority that Court allowed the appeals and dismissed the action.

Section 3 of *The Families' Compensation Act* reads:—

> 3. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to an indictable offence.

This Act is based on Lord Campbell's Act, 9-10 Victoria, c. 93, which was in force in British Columbia in the early days (English Law Act, c. 69, C.S.B.C. 1888). Section 5 of Lord Campbell's Act provided that "the word 'person' shall apply to bodies politic and corporate", so that there was no difficulty in sueing a corporation, and in the case of *Vose* v. *Lancashire and Yorkshire Railway Co.* (1), referred to by Robertson JA., the point was not mentioned. There was no provision that "person" should include an executor or administrator. Section (1) which contains the recital, together with the other provisions of the Act, seem to make it clear that, while giving an action on behalf of the dependents of the person wronged, no action was given against the personal representatives of an individual wrongdoer in case of the latter's death. It is true that s. 24 of *The Interpretation Act,* R.S.B.C. 1948, c. 1, enacts:—

> (31). "Person" includes any corporation, partnership, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law.

but by the opening sentence of the section this is so "unless the context otherwise requires". Bearing in mind the history of *The Families' Compensation Act* and its prototype, the context is such, in my opinion, that the definition cannot apply.

It is under *The Families' Compensation Act* that the present action is brought and the plaintiff is the infant son of Henry Michael Cairney. The action is, therefore, not one covered by s-s. (2) of s. 71 of *The Administration Act*

(1) (1858) 2 H. & N. 728.

since it deals only with actions by an executor or administrator and because "the damages recovered in the action shall form part of the personal estate of the deceased", which is never the case in actions under Lord Campbell's Act and similar enactments such as *The Families' Compensation Act*. On this ground alone the plaintiff is unable to secure any assistance from the provisions of *The Administration Act*.

The decision in *Bowcott* v. *Westwood* was that of a single judge and Counsel agreed that it stands alone. Under those circumstances I am unable to agree that it can be brought within the authorities of which *Barras* v. *Aberdeen Steam Trawling and Fishing Company, Limited* (1) and *MacMillan* v. *Brownlee* (2), are examples. It cannot be said that one decision of a single judge is a clear judicial interpretation and certainly there is no course of judicial decision.

The appeal should be dismissed, but, in accordance with the written consent filed on behalf of both parties, not only is the dismissal to be without costs, but the judgments below should be varied so as to provide that there shall be no costs of the action or any of the proceedings, including the applications to the judge of first instance and the appeals to the Court of Appeal.

RAND J.:—This is an action for compensation brought under *The Families' Compensation Act* of British Columbia arising from the death of a passenger in a plane crash which took the lives of all persons aboard. The respondent is the administratrix of the estate of the pilot whose negligence is alleged to have been responsible for the accident. There is admittedly no evidence available to enable a finding that as between the passenger and pilot the one survived the other or that both died at the same moment. In the view I take of the law, the narrow question is this: who was the person who would have been liable to the passenger if death had not ensued within the meaning of s. 3 of that Act, the material portion of which reads:

> Whenever the death of a person shall be caused by wrongful act . . . and the act . . . is such as would (if death had not ensued) have entitled

(1) [1933] A.C. 402.

(2) [1937] S.C.R. 318; [1940] A.C. 802.

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the party injured to maintain an action and recover damages in respect thereof, then and in every such case the *person who would have been liable* if death had not ensued shall be liable to an action for damages, . . .

If the pilot's death had occurred first, then by force of s. 71(3) of the *Administration Act*, R.S.B.C. (1936) c. 5 there accrued at that moment to the then living passenger a right of action against the legal representative of the deceased pilot and that representative would, upon the death of the passenger, become liable to the beneficiaries under s. 4 of the *Compensation Act*. On the other hand, if the pilot survived the passenger, it would be against him that the passenger, at the moment of his death, had the right of action and it would also be against the pilot only that the right of the beneficiary would lie: on the death of the pilot the right would, under the well established rule of the common law, come to an end and there is nothing in s. 71 which affects that result. The governing point of time in each case is that of the passenger's death: I cannot agree that the words "if death had not ensued" can be interpreted to extend indefinitely the time within which the person liable is determinable. This was the view taken by the Judicial Committee in *B.C. Electric Railway* v. *Gentile* (1) in which Lord Dunedin used this language:

> Their Lordships are of opinion that the punctum temporis at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place. At that moment, however, the test is absolute. If, therefore, the deceased could not, had he survived at that moment, maintained, i.e. successfully maintained, his action, then the action under the Act does not arise.

If the two had died at the same moment, since for the purpose of s. 3 the person wronged is momentarily conceived to be alive, I should be inclined to hold that at that moment the wrongdoer then being dead s. 71(3) came into effect and the right given by s. 3 to beneficiaries would be against the legal representative of the wrongdoer. But it has long since been laid down by the House of Lords as the law of England that in the case of such a casualty there is no presumption of law either as to survival of the one or other or as to death of both at the same moment: *Wing* v. *Anfranc* (2). As the pilot may have survived the passenger,

(1) [1914] A.C. 1034. (2) 11 E.R. 407.

the presumption of either of the other two possibilities is excluded and with it the possibility of finding that the person liable was the legal representative of the pilot.

In *Wing* the wills of husband and wife, lost at sea together, were involved and the condition of the will of each was that the other should survive. The result of the decision was to distribute the estates of both as if they had died at the same moment and that seems to have led some American authorities, in such cases, to adopt the presumption that the deaths were simultaneous: Cyc. of L. & P. v. 13, a,309 p. (*b*). What brought about the result in *Wing* was the prima facie presumption that the next of kin are entitled to the personal property of a deceased, and as neither side could show that the condition of the will under which he claimed was fulfilled both were out of court and that presumption carried. But there is no analogous resort available to the circumstances here. This may seem to be unfortunate, but where, as here, the language of the statute is, as I read it, clear no other result is open.

Robertson J.A. in the Court of Appeal took the word "person" in s. 3, by force of the *Interpretation Act,* to include executors and administrators, but I am unable to agree that such a modification in the law as would follow from that view could have been contemplated. Moreover, as my brother Locke points out, that inclusion is to be ascribed only to the representatives of the person "to whom the context can apply according to law", a qualification which is fatal here.

I would, therefore, dismiss the appeal on the terms mentioned in the reasons of the Chief Justice.

KELLOCK J.:—In determining the question as to whether or not this action is properly constituted, it would be necessary to conclude that the action would be so constituted irrespective of whether the deceased passenger, Henry Michael Cairney, survived or predeceased the pilot, Douglas Duncan MacQueen, as it is admitted that it is not possible to determine that fact. The question thus raised depends upon the proper construction of the *Families' Compensation Act,* which statute creates the cause of action here asserted, a cause of action which is an entirely new

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right and quite distinct from any right of action vested either in the deceased passenger himself, had he survived, or his personal representative.

S. 3 of the statute provides that in the case of the death of a person caused by wrongful act, neglect or default which would, if death had not ensued, have entitled the party injured (that is, the person whose death was thus wrongfully caused) to maintain an action and recover damages in respect thereof, then "the person who would have been liable if death had not ensued" to such an action is to be liable to the action for which the statute provides in favour of the class of persons therein limited.

Where the tortfeasor predeceases the victim of the wrong, the latter, "the party injured", could not, at common law, maintain any action against the personal representative of the tortfeasor. By reason, however, of s. 71, s-s. (3) of the *Administration of Estates Act,* the victim became enabled to sue the executor or administrator of the tortfeasor and there would in such case be a "person who would have been liable if death (i.e., the death of the victim) had not ensued."

Where, however, the tortfeasor survives the latter, the victim, at the moment of his death (on the fictional assumption required by the statute that his death did not ensue) would, at common law, be entitled to maintain action against the tortfeasor. Accordingly, as this is the condition which the statute lays down, a member of the class under the *Compensation Act* would, by virtue of that Act, also be entitled to sue the tortfeasor.

The important consideration for present purposes at this point, however, is that, while the right of action of the victim himself against the tortfeasor would not, because of the express provisions of s-s. (3) of s. 71 of the *Administration of Estates Act,* be affected by the death of the latter, the right of action under the *Compensation Act* is not preserved in such case. As pointed out by Lord Dunedin in *B.C. Electric Railway* v. *Gentile* (1), employing the language of Coleridge J. in *Blake* v. *Midland Railway* (2):

> . . . "it will be evident that this Act does not transfer this right of action" (of the deceased) "to his representative, but gives to the representative a totally new right of action, on different principles."

(1) [1914] A.C. 1034 at 1040. (2) 18 Q.B. 93 at 110.

It is well settled that this new right of action abates on the death of the tortfeasor and there is nothing in the *Compensation Act* which prevents that result or allows a person suing under that statute to invoke the provisions of the *Administration Act* although the victim himself might have done so. In speaking of the conditions precedent to action under the *Compensation Act,* Lord Dunedin stated at p. 1041:

> The second is that the default is such "as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof."
>
> Their Lordships are of opinion that the punctum temporis at which the test is to be taken *is at the moment of death,* with the idea fictionally that death has not taken place. At that moment, however, *the test is absolute.*

In *Haley* v. *Brown* (1), Smith J.A., says at p. 10 that sec. 3 of the *Compensation Act* makes *any one* liable whom the injured person could have sued if alive.

On this footing the learned judge, as did Davey J.A., held that a plaintiff under the *Compensation Act* could sue the personal representatives of the tortfeasor, who died after surviving the victim. In my opinion, the *Compensation Act* permits action "against the person who would have been liable if death (i.e., the victim's death) had not ensued," that is, in the circumstances under consideration, the tortfeasor himself. The statute does not authorize an action against anyone else.

Accordingly, as in the present case it cannot be shown that MacQueen did not survive Cairney, the action is not properly constituted.

It has, however, been contended that the provisions of s. 24 of the *Interpretation Act are* pertinent in a case such as the present. That section reads as follows:

> In every Act of the legislature, unless the context otherwise requires:—
>
> (31) "Person" includes any corporation, partnership, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law.

As, however, as already pointed out, an action under legislation of the character of the *Families' Compensation Act* abates upon the death of the tortfeasor where the latter survives the victim, the law does not permit the context of s. 3 to apply so as to permit action to be taken against the

(1) [1955] 15 W.W.R. 1.

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personal representative of the tortfeasor. It would require, in my opinion, an express provision to extend the right of action under the *Families' Compensation Act* to such a situation.

The appeal should be dismissed but in accordance with the consent filed; the order as to costs should be that proposed by the Chief Justice.

LOCKE J. (dissenting):—This is an appeal by special leave granted by the Court of Appeal for British Columbia from a judgment of that court which allowed the appeal of the respondent MacQueen from two orders made by Wilson J. pronounced on March 24 and May 17, 1954, and directed the dismissal of the action. Robertson J. A. dissented and would have dismissed the appeal.

The plaintiff is an infant, the son of Henry Michael Cairney, deceased, and brought the action by Jeanette Cairney, his mother, as next friend. The claim advanced is for damages in respect of the death of Cairney in an accident which occurred on October 17, 1951, when an aeroplane, the property of the defendant, Queen Charlotte Air Lines Ltd., and piloted by Douglas Duncan MacQueen, the husband of the respondent MacQueen, crashed. Both Cairney and MacQueen and all other persons aboard the plane were killed. The right of action asserted was for damages occasioned by the negligence of the defendant company and of MacQueen under the provisions of *The Families' Compensation Act* (c. 116, R.S.B.C. 1948) and was brought on behalf of the infant plaintiff only.

Both of the named defendants defended the action. Upon the application of the defendant company under the provisions of *The Workmen's Compensation Act* (c. 312, R.S.B.C. 1948), the Workmen's Compensation Board determined that the right of action asserted against the company was taken away by Part 1 of that Act and the action proceeded against the respondent MacQueen alone, as administratrix of the estate of her deceased husband.

The matter came before Wilson J. upon a special case for the opinion of the court under the provisions of Marginal Rule 389 of the Supreme Court of British Columbia. The special case, as first stated for the opinion of the court, recited the fact of the death of both Cairney

and MacQueen in the accident on October 17, 1951, the issue of the writ in the action on May 2, 1952, the nature of the cause of action asserted, that letters of administration of the estate of MacQueen had been issued to his widow on November 20, 1951, and continued:—

> The question for the opinion of the Court is whether this action having been brought after the expiration of six months from the death of the said Douglas Duncan MacQueen this action is maintainable against the defendant Roberta Burrells MacQueen, administratrix of the estate of Douglas Duncan MacQueen, deceased.
>
> If the Court shall be of opinion in the negative of the said question, then judgment shall be entered for both defendants with their costs of defence.
>
> If the Court shall be of opinion in the affirmative of the said question, then this action shall proceed to trial against the Defendant Roberta Burrells MacQueen, Administratrix of the estate of Douglas Duncan MacQueen, deceased.

By an order of Wilson J. dated March 24, 1954, the question submitted was answered in the affirmative and it was ordered that the action proceed against the defendant MacQueen.

The special case dated February 26, 1954 was thereafter, by agreement between the parties, supplemented by propounding a further question, namely:—

> The question for the opinion of the Court is whether, apart altogether from the fact that this action was not brought until after the expiration of six months from the death of Douglas Duncan MacQueen, this action is maintainable against the Defendant Roberta Burrells MacQueen, Administratrix of the Estate of Douglas Duncan MacQueen, deceased, it having been brought by the Plaintiff in his individual capacity and against the personal representative of the alleged tortfeasor.

The supplementary special case said further that if the Court should be of the opinion in the negative of the said question, judgment should be entered for both defendants with costs but, if in the affirmative and if the Court should also be of opinion in the affirmative of the first question propounded, the action should proceed to trial against the defendant administratrix.

On May 17, 1954, Wilson J. ordered that the question submitted be answered in the affirmative and directed that the action proceed to trial.

The formal order of the Court of Appeal allowing the appeal of the present respondent directed that the action be dismissed with costs.

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S. 3 of *The Families' Compensation Act* reads:—

> Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to an indictable offence.

S. 4 declares that every such action shall be for the benefit of the wife, husband, parent and child of the person whose death has been caused and shall be brought in the name of the executor or administrator of the deceased, but that if there be none such or no such action having been brought within six months after the death of the deceased person, then the action may be brought in the name of the person or persons for whose benefit the action would have been if brought in the name of such executor or adminisrator. Any such action must under the terms of s. 5 be brought within twelve months after the death.

The Act is, with an exception later referred to, for all practical purposes the same as *Lord Campbell's Act* (9-10 Vict. c. 93 Imp.) and came into force in British Columbia prior to 1871. The history of the statute in British Columbia is to be found in the reasons for judgment delivered in this matter by Mr. Justice Robertson.

The rule of the common law expressed in the maxim *actio personalis moritur cum persona* as it applied to liability for tort, was that if injury were done either to the person or property of another for which damages only could be recovered in satisfaction, the action died with the person to whom or by whom the wrong was done (*Wheatley v. Lane* (1); *Broom,* 10th Ed. 611).

The statute provided an exception to that rule. As pointed out in *Seward v. Vera Cruz* (2), it gave a new cause of action 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 would survive, but to his wife and children. As the Earle of Selborne L.C. there said, death is essentially the cause of action. This view was adopted by the Judicial Committtee in *British Columbia Electric v. Gentile* (3).

(1) (1669) 1 Wms. Saund. 216. (2) (1884) 10 A.C. 59 at 67.
(3) [1914] A.C. 1034.

In 1934, s. 71 of *The Administration Act* (c. 5, R.S.B.C. 1924) was repealed and reenacted in terms which, together with amendments made later, raise the question to be determined on this appeal. S. 71(2) provides that the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or property of the deceased, in the same manner and with the same remedies as the deceased would, if living, be entitled to, with certain specified exceptions. These exceptions in the amendment of 1934 did not include damages for loss of expectation of life but, by an amendment (c. 2 of the Statutes of 1941-42), this was added and, in addition, a further exception, "if death results from such injuries, to damages for the death." Since the rights of the personal representatives were only those which the deceased would have had if living, the last mentioned exception would appear to have been superfluous. It may perhaps have been added, together with the further words added to the subsection "provided that nothing herein contained shall be in derogation of any rights conferred by *The Families' Compensation Act*", to make it clear beyond question, that claims asserted by reason of the death could be made only under the last mentioned statute.

S-s. 3, so far as it need be considered, reads:—

> In the case of any tort or injury to person or property, if the person who committed the wrong dies, the person wronged or, in the case of his death, his executor or administrator, may bring and maintain an action against the executor or administrator of the deceased person who committed the wrong, and the damages and costs recovered in the action shall be payable out of the estate of the deceased in like order of administration as the simple contract debts of the deceased.

A further provision of the subsection is that, with an exception which is irrelevant here, no action shall be brought under its provisions after the expiration of six months from the death of the deceased person who committed the wrong.

S-s. 4 provides that, in the case of the death of the person wronged or the person who committed the wrong during the pendency of an action concerning the matter, it may be continued in the name of or against the personal representative and, if both parties die, between their respective personal representatives.

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S-s. 6 declares, *inter alia,* that nothing in the section shall prejudice or affect any right of action under the provisions of *The Families' Compensation Act.*

The question as to whether this section applies to, or affects, claims which may be asserted under *The Families' Compensation Act* is one as to which there has not been unanimity in the courts of British Columbia. In *Bowcott v. Westwood* (1), Fisher J., (as he then was), decided that the rights conferred by s. 71 extend the rights conferred on the dependents of deceased persons by *The Families' Compensation Act* and that, accordingly, so much of the amendment as relates to causes of action against the estates of deceased persons should apply to causes of action under the former Act. Being of this opinion, he held that an action by the administratrix of a deceased person lay against the executrix of a person by whose negligence it was said the death had been caused.

When the present matter was considered by Wilson J., that learned judge considered that he should follow the decision of Fisher J., leaving to the Court of Appeal the responsibility of overruling it, if it was wrong. It should be said that no question as to the application of the limitation section of *The Administration Act* arose in *Bowcott's* case.

In the Court of Appeal the Chief Justice of British Columbia, after pointing out that, as the matter came before the court, it was not known whether Cairney and MacQueen had died together at the moment of impact or if one survived the other, considered that, in view of the lack of evidence of survivorship, *The Administration Act* could not be invoked either in relation to its limitation provisions or to interpret the status of the plaintiff suing under *The Families' Compensation Act.* As to a contention advanced on behalf of the present appellant that the word "person", where it appears for the second time in s. 3 of *The Families' Compensation Act,* should be construed as including the personal representative of the deceased tortfeasor, that learned Chief Justice said that, in his view, if the Legislature had intended to abrogate the maxim *actio personalis moritur cum persona* in this type of action, it would have plainly said so.

(1) (1937) 51 B.C.R. 441.

Sidney Smith J. A. decided that, as *The Families' Compensation Act* did not give any right of action against the personal representatives and since an action based upon the provisions of *The Administration Act* must be brought within six months after the death of the tortfeasor, the claim could not succeed, the action not having been brought within that time.

Robertson J. A. who dissented, came to his conclusion on different grounds.

S. 3 of *The Families' Compensation Act,* as above pointed out, says that the person who would have been liable if death had not ensued shall be liable to an action. The word "person" is not defined in the Act. *The Interpretation Act* (R.S.B.C. 1948, c. 1) declares that each provision thereof shall extend and apply to the Revised Statutes and to all Statutes of the Legislature, except in so far as any provision thereof is inconsistent with the intention and object of any Act or the interpretation that the provision would give to any word, expression or clause is inconsistent with the context. S. 23(31) provides that in every Act of the Legislature, unless the context otherwise requires, the word "person"

> includes any corporation, partnership or party and the heirs, executors, administrators or other legal representatives of such person to whom the context can apply according to law.

That learned judge considered that the effect of this was to abrogate entirely the *actio personalis* rule in the cases mentioned in s. 3 and that, accordingly, the action could be maintained under the provisions of that Act and that it had been brought in time. Being of this opinion, he did not consider it necessary to consider the point as to the application of s. 71 of *The Administration Act.*

It is pointed out by Robertson J. A. that *Lord Campbell's Act* was in force in British Columbia up to the year 1897. In the revision of the statutes of that year, most of the provisions of that Act were reenacted in c. 58 and the Imperial Statute repealed to the extent that it was so incorporated in the Revised Statutes or was repugnant thereto by virtue of s-s. 2 of s. 6 of *An Act respecting the Revised Statutes of British Columbia* passed on May 8, 1897. *The Interpretation Act of British Columbia* did not apply to the Imperial Statute. As enacted c. 55 did not

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include s. 5 of c. 93 which, *inter alia,* declared that the word "person" should apply to bodies politic and corporate. Robertson J. A. was of the opinion that the reason for the omission of this part of s. 5 was that, from the date of its enactment, the Act of the Legislature would be construed in accordance with the provisions of *The Interpretation Act,* and thus that to assign by its terms any extended meaning to the word "person" was unnecessary.

In *Haley v. Brown* (1), the application of s. 71 of *The Administration Act* to actions brought under *The Families' Compensation Act* was further considered by a court consisting of Robertson, Sidney Smith and Davey JJ. A.

The action was brought by the executrix of Haley's estate against the executor of Brown's estate, the cause of action being damages in respect of his death. In this case there was evidence that Haley and Brown had been killed in the same accident but that the latter had survived Haley by a few minutes. No question of limitation arose in the matter. At the trial, Wood J. followed the decision of Fisher J. in *Bowcott* v. *Westwood* and awarded damages and this judgment was upheld by the unanimous judgment of the Court of Appeal.

Robertson J. A. adhered to the view that he had expressed in Cairney's case and added, as a further reason for holding that the action lay against Brown's executor, that after the decision in *Bowcott's* case s. 71 of *The Administration Act* had been reenacted without change in the Revised Statutes of 1948. Since it was to be assumed that the Legislature knew the existing state of the law and the interpretation given to the statute by Fisher J., he considered that the statute should be construed in accordance with the meaning that he had there assigned to it.

Sidney Smith and Davey JJ. A. were both of the opinion that s-s. 3 of s. 71 might properly be invoked to support the claim against the personal representative.

The decisive question in the matter is, in my opinion, as it is stated by Sidney Smith J. A. in *Haley's* case at pp. 10 and 11 of the report. In applying s. 3 of *The Families' Compensation Act,* the question is who the person wronged could have sued in respect of his injuries

(1) [1955] 15 W.W.R. 1.

had he lived. Against such person, whether the wrongdoer or his personal representative, the action lies at the suit of the personal representative of the one who was wronged on behalf of the dependents, or, in the circumstances mentioned, by the dependents on their own behalf. In the present case, Cairney, if alive, might by virtue of s-s. 3 of s. 71 of *The Administration Act* have sued MacQueen if he were alive and, if dead, his personal representative, and accordingly this action lies.

It is the law as it was at the date of the fatal accident and not as it was at the date of the enactment of *The Families' Compensation Act* that is to be considered *(Littley v. Brooks* (1) *Robin v. Union Steamship Co.* (2)*)*. Since the question is as to whom Cairney, if living, might at the date of the issue of the writ have sued, the fact that there is no evidence to prove when in relation to the death of Cairney the death of MacQueen occurred does not, in my opinion, affect the matter.

Since this is decisive of this aspect of the matter, I refrain from expressing any opinion upon the grounds relied upon by Robertson J. A. for his conclusion in this and in *Haley's* case.

There remains the question of the limitation imposed by s-s. 3(*b*) of s. 1 providing that:—

> No action shall be brought under the provisions of this subsection after the expiration of six months from the death of the deceased person who committed the wrong.

More than six months elapsed between the death of MacQueen and the issue of the writ.

In the Court of Appeal neither the Chief Justice or Robertson J. A. expressed any opinion on the point, they having reached their conclusions as to the proper disposition of the matter on other grounds. Sidney Smith J. A. was, however, of the opinion that the six months limitation applied and, accordingly, the action failed.

S-s. 6 of s. 71 reads:—

> This section shall be subject to the provisions of s. 12 of *The Workmen's Compensation Act* and nothing in this section shall prejudice or affect any right of action under the provisions of s. 80 of that Act or the provisions of the *Families' Compensation Act*.

(1) [1932] S.C.R. 462.
(2) [1920] A.C. 654.

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The reference was to s. 80 pf *The Workmen's Compensation Act,* c. 278 R.S.B.C. 1924, which is now s. 82 of c. 370 R.S.B.C. 1948 and deals with the liability of employers to their workmen in industries not within the scope of Part 1 of the Act, for injuries caused by defective plant or premises or the negligence of other servants of the employer.

Wilson J. was of the opinion that s-s. 6 excluded the limitation provision in s-s. 3 and that, accordingly, the action which was brought within one year from the death of Cairney was not barred. With this conclusion I respectfully agree.

It is, in my opinion, inaccurate to say that this action is brought under the provisions of s. 71 of *The Administration Act* and, indeed, no such action could be brought under those provisions. The action is under *The Families' Compensation Act* and the only resort to *The Administration Act* is to ascertain who was the person who would have been liable, if Cairney had not died, for damages in respect to his injuries. The cause of action, as has been pointed out, is not in respect of those injuries but arises solely by reason of his death. In my opinion, while the language of the statute to be construed differs, the principle applied by the Judicial Committee in *Gentile's* case applies here.

I also consider that, if it could be invoked, s-s. 6 of s. 71 precludes the application of the limitation provision to this action. I think it cannot be said that a statutory provision which declares that no action shall be brought after the expiration of a period of six months does not affect the right of action under *The Families' Compensation Act* which, by the terms of that Act, may be brought within a more extended period.

For these reasons, I would allow this appeal and restore the order of Wilson J. We were informed at the hearing that, irrespective of the results of this appeal, the parties did not wish us to make any order as to costs.

CARTWRIGHT J. (dissenting): The relevant facts, the history of the legislation and the course of this litigation are set out in the reasons of my brother Locke.

In approaching the question before us, it is, I think, helpful to consider what the position of the parties would have been at common law and the manner in which their

rights have been altered by statute. In the view which I take of the whole case, it is immaterial whether the passenger, Cairney, died before or after the pilot, MacQueen, or whether they died simultaneously.

At common law it is clear that the appellant would have had no remedy for two reasons, first, the rule stated by Lord Ellenborough in *Baker v. Bolten* (1) and affirmed by the House of Lords in *Admiralty Commissioners v. S.S. Amerika* (2), that in a civil court the death of a human being cannot be complained of as an injury, and, second, that any right of action arising *ex delicto* came to an end with the death of the tortfeasor under the maxim, *actio personalis moritur cum persona.* The question is whether the relevant statutory provisions in force in British Columbia at the date of the passenger's death have removed both of these obstacles from the appellant's path.

It is conceded that the first obstacle was removed by Lord Campbell's Act; but, as originally enacted by the Imperial Parliament in 9 and 10 Victoria c. 93, that statute gave the appellant no assistance in regard to the second as the word "person" while extended to include bodies politic and corporate was not extended to include the personal representatives of the wrongdoer.

Section 3 of the *Families' Compensation Act,* R.S.B.C. 1948 c. 116, which was in force at the date of the passenger's death and has been in its present form for many years, reads as follows:—

> 3. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to an indictable offence.

The interpretation section of this Act (s. 2) contains no definition of the word "person", although, as has already been pointed out, that word was declared in Lord Campbell's Act to apply to bodies corporate. I agree with the view of Robertson J. A. that the reason for this omission was that the legislature regarded the matter as covered

(1) 1 Camp. 493. (2) [1917] A.C. 38.

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by the definition of the word "person" in the *Interpretation Act*. Any other view would bring about the result that in British Columbia a corporation would not be liable to an action under the *Families' Compensation Act*. Such a result would be inconsistent with the decision in *British Electric Railway Company Limited v. Gentile* (1) and, so far as I am aware, has never been suggested.

The relevant provisions of the Interpretation Act, R.S.B.C., c. 1, appear to me to be the following:—

> 2(1) This Act, and each provision thereof, shall extend and apply to these Revised Statutes, and to every Act passed after these Revised Statutes take effect, and to all Statutes of the Legislature, except in so far as any provision thereof is inconsistent with the intention and object of any Act, or the interpretation that the provision would give to any word, expression, or clause is inconsistent with the context, and except in so far as any provision thereof is in any Act declared not applicable thereto.
>
> * * *
>
> 24. In every Act of the Legislature, unless the context otherwise requires:—
>
> * * *
>
> (31) "Person" includes any corporation, partnership, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to law:

The question is whether the word "person" in the fifth line of s. 3 of *The Families' Compensation Act* is to be extended by s. 24 (31) of the *Interpretation Act* to read "person and the heirs, executors, administrators or other legal representatives of such person". I agree with Robertson J. A. that it should be so extended. I can find nothing in the result brought about by so reading it which is inconsistent with the intention and object of the *Families' Compensation Act* or would give to the word "person" an interpretation inconsistent with the context, to use the words of s. 2, nor does it appear that the context otherwise requires, to use the opening words of s. 24. I am unable to accept the view that the concluding words of clause 31 of s. 24, "to whom the context can apply according to law" prevent the application of the clause. As to this Robertson J. A. says:—

> Then as to the objection based upon the expression "according to law", I am of the opinion that in passing the Provincial Act the legislature was changing the law, and in so doing was making use of its own Interpretation Act as to the meaning of words used in the Provincial Act so as to shorten the terms of that Act.

(1) [1914] A.C. 1034.

The learned Chief Justice of British Columbia, in rejecting the argument that clause 31 of s. 24 of the *Interpretation Act* applies, says:—

> Assuming that the Families' Compensation Act permits this action to be maintainable, it is my view that the phraseology defining "person" as the "person who would have been liable if death had not ensued" must be construed in this context as excluding the personal representative of the deceased tortfeasor. It seems to me if the legislation intended to abrogate the maxim *actio personalis moritur cum persona* in this type of action it would have plainly said so. The indirect method of abrogating such a common law principle by engrafting an artificial meaning onto the Section by the Interpretation Act, R.S.B.C. 1948, Ch. 1, is one, with deference, I am unable to accept.

With the greatest respect, the last quoted passage appears to me to give insufficient weight to the fact that the passing of the *Administration Act Amendment Act, 1934*, Statutes of British Columbia, 1934, c. 2 s. 2, brought about, except in cases of defamation, the virtual abolition in British Columbia, of the maxim *actio personalis moritur cum persona*. Applying the words of the *Families' Compensation Act* and of the *Interpretation Act* to the circumstances of the accident of October 17, 1591, it appears to me that the extended interpretation of the word "person" should be adopted, that so doing, far from effecting an abrupt change in the law, brings the Act into harmony with the general law, avoids the creation of anomalies which the Legislature can hardly be supposed to have intended and gives effect to the *Families' Compensation Act* according to its true intent and meaning. An example of an anomaly which would result from rejecting the view of Robertson J. A. is as follows: Suppose A by one act of negligence causes (i) the death of B who leaves a widow and child, (ii) the destruction of B's motor car, and (iii) personal injuries to C, and that A survives B but dies before action taken; the causes of action under (ii) and (iii) could be pursued against A's personal representatives while that under (i) would perish with him.

I have not overlooked the difficulty that this reasoning, as to the effect of the *Administration Act Amendment Act of 1934* on the construction of the *Families' Compensation* Act, is subject to the objection that, although there has been no change in the relevant wording of the *Families' Compensation Act* or the *Interpretation Act*, it envisages the possibility of those acts being construed after 1934 in

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a manner different from that in which they would have been construed before that date; but this difficulty is, I think, apparent rather than real. The question being whether the extended meaning attributed to the word "person" can apply according to law to the personal representatives of such person after his decease I find no inconsistency in deciding that they can so apply after the abolition of the maxim *actio personalis moritur cum persona* as part of the general law of British Columbia even if (a matter which I find it unnecessary to decide) they could not have so applied while that maxim formed part of such general law.

Once it has been decided that on its proper construction s. 3 of the *Families' Compensation Act* gives a right of action not only against "the person who would have been liable if death had not ensued" but also against the administrator of such person, it follows that the limitation of six months imposed by s. 71 (3) (b) of the *Administration Act* has no application to the action before us. The rights of the parties fall to be determined under the *Families' Compensation Act,* construed as above, and the only relevance of the *Administration Act* is the assistance which, by reason of the change which is brought about in the general law by the virtual abolition of the maxim *actio personalis moritur cum persona,* it affords in the task of construing s. 3 of the *Families' Compensation Act.*

For the above reasons I would allow the appeal, restore the order of Wilson J. and direct, in accordance with the consent of the parties, that there should be no order as to costs in this Court or in the courts below.

Appeal dismissed; no costs.

Solicitor for the appellant: *W. S. L. Young.*

Solicitors for the respondent: *Tysoe, Harper, Gilmour & Grey.*