New Jersey Court of Errors and Appeals

ALFRED H. ELLIS, Adm'r, &c., of ROBERT J. ELLIS, deceased, *Plaintiff-Respondent,*	Action at Law.
vs.	On Appeal from Supreme Court of New Jersey.
THE PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellant.*	

BRIEF FOR DEFENDANT-APPELLANT.

I.

This was a motion in the Supreme Court for judgment of *non pros,* and for the allowance of costs in favor of defendant against the plaintiff, who is an administrator, suing under the provisions of the "Death Act". The pleadings and motion papers set forth the material facts. (See State of the Case, pp. 3-9).

The Court granted the judgment of *non pros,* but denied costs (Case, p. 12). The present appeal is from so much only of that judgment as denies costs (Case, p. 1).

II.

The suit is brought under the "Death Act" (2 Comp. Stat., pp. 1907-8, as amended by P. L. 1913, p. 586), which provides as follows:

"An Act to Provide for the Recovery of Damages in Cases where the Death of a Person is caused by Wrongful Act, Neglect or Default.

"SEC. 1. That whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"2. Every such action shall be bought by and in the names of their personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband, and next of kin of such deceased person, and shall be distributed to such widow, surviving husband, and next of kin, their proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death to the wife, surviving husband and next of kin of such deceased person; *provided,* that where such deceased person has left or shall leave him or her surviving a widow or husband, but no children or descendant of any chilren, and no parents, the widow or surviving husband, as the case may be, shall be entitled to the whole of the damages which she or he shall sustain, and which shall be hereinafter recov-

ered in any such action, and the same shall be paid to her or to him; *and provided further,* that every action shall be commenced or sued within two years after the death of such deceased person and not after."

III.

The statute governing the allowance of costs is Section 229 of the Practice Act (P. L. 1903, p. 596; 3 Comp. Stat., p. 4123), which provides as follows:

"If the plaintiff in any action shall recover debt or damages, he shall have judgment to recover his costs against the defendant to be taxed in the manner prescribed by law, which shall be levied and collected by execution together with the debt or damages; in any action wherein the plaintiff on a judgment in his favor would be entitled to recover costs, the defendant if the plaintiff shall be nonprossed or nonsuited or a judgment shall pass for the defendant shall have judgment to recover his costs against the plaintiff (except against executors or administrators prosecuting in the right of their testators or intestates) to be taxed as aforesaid and have such execution as the plaintiff might have had against him if judgment had been given in such action for the plaintiff; if judgment shall be arrested, each party shall pay his own costs."

IV.

THE ADMINISTRATOR DOES NOT PROSECUTE IN THE RIGHT OF HIS INTESTATE, BUT IN THE RIGHT OF THE BENEFICIARIES UNDER THE ACT.

That the defendant could not recover costs against an administrator in an action brought

under the "Death Act," was held by the Supreme Court in the case of—

Kinney v. *C. R. R. Co.*, 34 N. J. Law, 273 (1870).

While this rule undoubtedly has been applied in practice, in like cases, ever since the decision in the *Kinney* case, still there is no subsequent adjudication which specifically sustains it. We respectfully submit that the *Kinney* case was not considered from the viewpoint of whose right was being prosecuted, but rather assumed that it was the intestate's; and that it is erroneous in principle and should be overruled.

We feel, too, that the Supreme Court was convinced of this proposition on the application now under review, but preferred not to depart from its policy regarding the overruling of its own decisions, leaving it to this Court to perform that function, even though the Supreme Court itself felt that a previous case should give way to later conviction.

We do not attempt to controvert the rule prescribed by the Practice Act (quoted *supra*), enunciated in the case of

Norcross v. *Boulton*, 16 N. J. Law, 310, at 311-312, 315-316 (1838), (which was followed by Mr. Justice Dalrimple in the *Kinney* case,)

and re-asserted by Mr. Justice Collins in

Bell v. *Samuels*, 60 N. J. Law, 370, at 372 (1897),

when it clearly appears that the administrator prosecutes in the right of his intestate.

But we contend that the rule should be confined to situations where the plaintiff does so prosecute in the right of the decedent.

In *Norcross* v. *Boulton*, Chief Justice Hornblower said, at p. 312:

"The reason for the exception is not simply because executors and administrators are only trustees and acting *in auter droit,* but because they cannot be presumed to be fully acquainted with the transactions of their testators or intestates; and to know their respective rights and duties. Consequently when an executor in good faith prosecutes an action, which he has *in the right of his testator;* that is, an action which accrued to his testator, in his lifetime, and is transferred to him as executor; or, which is founded on or grows out of a contract made with the testator, or an injury done to him in his lifetime; and fails in such action, he shall not pay costs. But where an executor brings trover, founded, as in this case, upon his own possession; or any other action which has accrued *to him* upon *his own* transactions as executor, or for an injury done to the property of the testator since his death, he is presumed to know the facts of his case, and the justice of his claim; and in such case he may sue in his own name; and therefore shall pay costs if he fails."

And Mr. Justice Ford, in his opinion in that case said, at pp. 315, 316:

"The law has been too long and too fully settled to be disputed at this day, that if an executor or administrator charge the wrong for which the suit is brought, as being done to *himself,* and fail to prove his case, that he shall pay the costs; for he sues in that case in his *own right;* but if he charge that the wrong was done to his *testator* or *intestate,* and fail to prove it, he shall not pay costs, for he sued *in right of his testator,* not of himself. * * * By the exception in our statute, *Rev. Laws,* 168, Section 2, executors or administrators are not to pay costs 'when suing *in right of*

> *their testators or intestates,'* but this plaintiff was not suing in right of his testator, for the conversion accrued long after his testator's death."

It should be borne in mind, however, that the "Death Act" was not enacted in this State until 1848 (P. L. 1848, p. 151), and *Norcross* v. *Boulton* was decided ten years earlier. The right conferred by the "Death Act," therefore, was not considered in that decision.

But notwithstanding this fact, Mr. Justice Dalrimple seems to have determined the *Kinney* case upon the strength of some statements made in *Norcross* v. *Boulton,* and upon the theory that the suit "was prosecuted by the plaintiffs in a representative capacity, for an alleged wrong done to their intestate in his lifetime." He further discusses the test suggested by counsel, namely, "whether the damages, if recovered, will be assets in the hands of the representative"; negatives that proposition as the test; and then concludes that—

> "The action is given by the statute, in terms, to the personal representatives of the deceased. That the damages, when recovered, are to be distributed among the widow and children to the exclusion of creditors, cannot take the case out of the general rule. Chief Justice Hornblower, in the case of *Norcross* v. *Boulton,* says that the doctrine that the plaintiff's liability to costs depends on the question whether the money, when recovered, would be assets or not has long been exploded, and was contrary to authorities older than those by which it was set up.
>
> "The defendants have not right to costs in this Court against the plaintiffs."

The question of whether or not a suit under the

"Death Act" is or is not prosecuted *in the right of the testator or intestate* is not discussed in terms, but seems to have been assumed in the affirmative because counsel's test of *assets in the hands of the representative, was negatived.* The Court, we respectfully contend, thereby fell into a not unusual fallacy of logic, namely, assuming the positive as being proved by denying the negative, without taking into consideration the possibility of an existing alternative. It is because we think that the real test was not argued or considered in the decision of the *Kinney* case, that we have concluded that we may with propriety request this Court to overrule it, notwithstanding that in practice it has been accepted for nearly half a century, and to hold that a suit under the "Death Act" is *not* prosecuted in the right of the testator or intestate, and that therefore the defendant was entitled to recover costs against the plaintiff in the present action upon the entry of the judgment of *non pros.*

In *Northampton Live Stock Ins. Co.* v. *Stewart,* 40 N. J. Law, 103 (1878), Mr. Justice Scudder, speaking for the Supreme Court, at page 105 of the report, takes the question as determined by the *Kinney* case, for granted, and gives no discussion of the principle involved. But this was not an action under the "Death Act."

In *Hupfer, Exr.* v. *Siegfried,* 26 N. J. L. J. 215 (1903), Mr. Justice Parker (then sitting as Circuit Court Judge in Hudson Circuit) also takes the rule as settled by the *Norcross* and *Kinney* cases, but the case before him involved an action brought originally by the testator for a *right in him* which was saved from abatement at his death specifically by Section 3 of the Abatement Act, and *his right was transferred over to the representative,* thus bringing the situation expressly within the language of Chief Justice Hornblower in the *Norcross* case quoted

supra. This was not a suit under the "Death Act."

In *Walton* v. *Taylor,* 78 N. J. Eq. 266 (1910), Mr. Justice Garrison, speaking for the Court of Errors and Appeals, at pages 267, 268 of the report, also accepts the *Kinney* case and the Practice Act provision without discussion in view of their inapplicability to the case then under consideration, which was on appeal from Chancery, where the procedure rested upon a different basis, and which did not involve the "Death Act."

And in like manner Mr. Justice Voorhees, speaking for the Supreme Court in *Manns, Admr.* v. *Sanford Co.,* 82 N. J. Law, 124 (1911), at page 126 of the report, takes the *Kinney* case for granted, without discussion; but even then his remarks are *dicta,* for, although the action was under the "Death Act," the decision did not rest upon the question of costs.

V.

The proposition that the suit by an administrator under the "Death Act" is not prosecuted in the right of the intestate, is borne out by a history of the right itself.

That at common law, there was no right of action for damages against a person causing the death of another, is well settled. *Actio personalis moritur cum persona.*

In England, in 1846, was enacted what is commonly called "Lord Campbell's Act", which is similar to the "Death Act" of 1848 in this State, *supra.*

5 *Amer. & Eng. Enc. of Law* (1st ed.), p. 125;

Pym v. *Gt. Northern Ry. Co.,* 4 B. & S. (Eng.) 396 (1863);

Grosso v. *D. L. & W. R. R. Co.,* 50 N. J. *Law,* 317 (1888).

In the *Pym* case, at page 400 of the report, the English act is stated as follows:

> Stat. 9 & 10 Vict. c. 93, entitled "An Act for compensating the families of persons killed by accidents:" after reciting in sect. 1 that "no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him," enacts: "That whensoever 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 has 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 felony."
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> Sect. 2. "Every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before mentioned parties in such shares as the jury by their verdict shall find and direct."

And Chief Justice Erle, at page 406 of the report, says of the Act:

> "The statute, as appears to me, gives to the personal representative a cause of action beyond that which the deceased would have had if he had survived, and based on a different principle. This was decided in the cases that have been referred to (citing cases)."

In *Blake, Admrx.* v. *Midland Ry. Co.,* 18 Q. B. (Eng.) 93 (1852), the Court, per Coleridge, J., said, at page 110:

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

In *Monaghan* v. *Horn,* 7 Can. Sup. Ct. Rep. at page 441, (1882), Taschereau, J., for the Court, said:

> "The one who died never had an action for being killed * * * The present plaintiff's action is not at all for injuries and damages caused to her deceased son, but purely and simply for injuries and damages caused to herself, the plaintiff."

In *Green* v. *Hud. River R. R. Co.,* 2 Keyes (N. Y. Ct. of Ap.), at page 303 (1866), the Court said:

> "In its legal aspect, the injury here complained of was done to the plaintiff and not to his deceased wife. The claim is for compensation for injury to his rights, and not to hers."

VI.

And in New Jersey, the cases dealing with the substantial right involved under our "Death Act", take the same view.

In *Grosso* v. *D., L. & W. R. R. Co.,* 50 N. J. L.,

317 (1888), *supra,* Mr. Justice Magie, speaking for the Supreme Court, said, at page 322:

> "Lord Campbell's act, as we have seen, gave an action in favor of a husband and parent, as well as of a wife and child, for an injury occasioned by death. * * * It gave an action in favor of the widow and of the children of the deceased. It also gave an action in favor of the husband and the parent.
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> "When the legislature of New Jersey passed the 'Act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default, approved March 3d, 1848, the lines of Lord Campbell's act were not followed. An action was thereby given in favor of the widow, but not in favor of the husband, and the action was not limited to the children, but extended for the benefit of the next of kin. The omission of the husband does not, however, in my judgment, indicate a legislative declaration that he already had a right of action. As we have seen, no recognition of any such right has been discovered. The omission may rather be assumed to indicate a legislative intent to provide redress for those who, in general, had been dependent upon the deceased, and who for that reason might be presumed to be peculiarly injured by his death."

In *Consolidated Trac. Co.* v. *Hone,* 60 N. J. Law, 444 (1897), Mr. Justice Van Syckel, speaking for the Court of Errors and Appeals, said, at page 446:

> "The damages recoverable are for those benefits only of which the next of kin are deprived by the decedent not living, and are to be distributed among the widow and next of kin, to the exclusion of creditors."

In *May, Admr.* v. *W. J. & S. S. R. R. Co.*, 62 N. J. Law, 63 (1898), Mr. Justice Lippincott, speaking for the Supreme Court, said, at page 67:

> "The statute has restricted the recovery to pecuniary injury. It is the reasonable expectation of pecuniary benefit, of which the person in whose interest the action is brought has been deprived that is recoverable in an action of this character."

In *Cooper* v. *Shore Elec. Co.*, 63 N. J. Law, 558 (1899), the Court of Errors and Appeals, speaking through Mr. Justice Depue, said, at pages 563-567:

> "This act (Lord Campbell's Act) created a new and anomalous kind of right and remedy by way of exception to the maxim *actio personalis moritur cum persona.* Poll. Torts 48. In this state, by an Act passed March 3d, 1848, entitled "An Act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default," remedy was given in every important particular analogous to that of the English statute. * * *
>
> "The English courts in construing Lord Campbell's act hold that the statute gave to the personal representatives a cause of action beyond that which the deceased would have had if he had survived, and based on a different principle—a new right of action. *Pym* v. *G. N. Railway Co.*, 4 Best & S. 396; *Blake* v. *Midland Railway Co.*, 18 Q. B. 93, 110. In *Seward* v. *Vera Cruz*, 10 App. Cas. 59, 67, 70, in the House of Lords, Lord Selborne in construing Lord Campbell's act says: 'It gives a new cause of action clearly, and does not merely remove the operation of the maxim *actio personalis moritur cum persona*, because the action is given in substance not to

the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which would survive, but to his wife and children, no doubt suing in point of form in the name of his executor.' Lord Blackburn said that 'a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived; an action which is new in its species; new in its quality, new in its principles, in every way new, and which can only be brought if there is any person answering the description of widow, parent or child, who under such circumstances suffers pecuniary loss by the death.' " * * *

"The controlling feature in this legislation is that damages are made recoverable for causing death as compensation for the pecuniary injury the designated beneficiaries have sustained by reason of the death. If there be no widow or next of kin at the time of the death of the deceased the pecuniary injury contemplated by the statute does not exist and the action cannot be maintained. It is also clear that the pecuniary injury to be compensated for is that of the widow or persons who are next of kin at the time of the death of the deceased, and that the cause of action created by the statute enures to such persons as a vested right. By this statute a property right is created in the beneficiary of such a nature as under the ruling in *Noice* v *Brown,* would give the action the quality of a survivorship and take it out of the maxim *action personalis moritur cum persona.*

"The pecuniary injury of the beneficiary begins immediately on the death of the deceased, and is a continuing injury until compensated for under the conditions expressed in the act. Suit must be brought within one

year after the death of the deceased, but how long the litigation may be protracted is problematical. If the death of the beneficiary before the end of the litigation discharges the liability of the wrongdoer, the legislative purpose that the wrongdoer should make compensation to the beneficiary for the pecuniary injury sustained by him would be defeated. Such a construction would be contrary to the policy of this legislation and would thrust into the administration of a statutory proceeding, which our courts have declared should be beneficially construed, a technical rule of the common law of harsh injustice.

"The death of the beneficiary pending suit will have a controlling influence over the quantum of recovery. The personal injury sustained would be limited in duration and extent to his lifetime. But the death of the beneficiary pending suit cannot be made available to abrogate the liability of the wrongdoer incurred for the pecuniary injury already sustained. The right to compensation vested in the beneficiary immediately upon the death of the deceased. By the death of the beneficiary pending suit there was neither an abatement of the action in the common law sense, nor was the cause of action to be compensated for discharged."

In *Gottlieb* v. *No. J. St. Ry. Co.*, 72 N. J. Law, 480 (1905), Mr. Justice Fort, for the Court of Errors and Appeals, said, at page 484:

"The fund recovered in an action under that statute is no part of the estate of the deceased wife. It is a fund arising out of a judgment in an action given by the statute for the benefit of specific persons, and which action, as Mr. Justice Depue expressed it, 'enures to such persons as a vested right.'

> The proceeds of the action enures, also, to the benefit of the persons named in the statute, and to them alone. The fund recovered is not to be distributed under the statute of distributions, as if a part of the intestate's estate, in the manner pointed out by that statute, but is to be apportioned solely among the beneficiaries named in the act of March 3d, 1848, in the method provided by the statute of distributions; that it, the fund received is to be distributed, by the administrator trustee receiving it, to the beneficiaries named in the act of March 3d, 1848, who are alone entitled to receive it."

In *Bretthauer, Admr.* v. *Jacobson,* 79 N. J. Law, 223 (1910), Chief Justice Gummere, speaking for the Supreme Court, said, at pages 225-226:

> "But this provision of the Death Act is not an ordinary statute of limitations. It operates not only as a limitation of the remedy given the plaintiff, but also as a limitation of the liability which it creates against defendants. *Lapsley, Admx.* v. *Public Service Corporation,* 46 Vroom, 266. Consequently, when the wrongful act which is the subject matter of the present litigation was committed by the defendants' employe, the defendants became legally liable for a period of twelve calendar months to compensate the next of kin of the deceased for the pecuniary injury resulting to them from his death and were exempt from such liability at the expiration of that period."

And the United States Supreme Court, in construing the Federal Employers Liability Act of 1908, an act which it states "is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human

being—that of 9 and 10 Vict. Chap. 93, known as Lord Campbell's Act," said:

> "This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had, —one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent on the decedent. It is therefore a liability for the pecuniary damage resulting to them, and for that only."
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> *Mich. Cent. R. R. Co.* v. *Vreeland,* 227 U. S. 59, at 67 (1913).

VII.

It would seem to be clear, therefore, that the administrator in the present action, as in all actions under the "Death Act," prosecutes not *in the right of his intestate, but in the right created by that act,* namely, *the right of those who have suffered pecuniary loss or injury through the death of the intestate.*

Hence, under Section 229 of the Practice Act, *supra,* the defendant should be entitled to its costs upon the entry of the judgment of *non pros* in this action.

VIII.

That part of the judgment of the Supreme Court under review should be reversed, with the direction to that Court to allow costs to defendant upon the entry of the judgment of *non pros.*

Evans v. *Adams,* 15 N. J. Law, 373, 377;
Norcross v. *Boulton,* 16 N. J. Law, 310, supra;
Den, d. Rutherford v. *Fen,* 21 N. J. Law, 700;

Eames v. *Stiles,* 31 N. J. Law, 490, 494;
Tomlinson v. *Armour & Co.,* 75 N. J. Law, 748;
Defiance Fruit Co. v. *Fox,* 76 N. J. Law, 482;
Allgair v. *Hickman,* 82 N. J. Law, 369;
P. L. 1912, at p. 382, secs. 25, 26; *Ibid.* at p. 398; Rule 79 (Supreme Court Rule 139); *Ibid* at p. 415, Form No. 37.

Respectfully submitted,

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NEW JERSEY

Court of Errors and Appeals.

ALFRED H. ELLIS, ADMINISTRATOR, &C., *Plaintiff-Respondent,* *vs.* PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellant.*	*Action at Law,*

Brief for Plaintiff-Respondent.

Plaintiff, as administrator of the estate of Robert J. Ellis, deceased, sued defendant to recover damages on behalf of the next of kin of deceased under the "Death Act," and judgment of non pros was entered against him in the Supreme Court "without costs" and appellant seeks to reverse this judgment so far as it denies costs.

I.

Section 1 of the statute provides in part as follows:

"Section 1. That 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, etc., 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 a felony."

Section 2 provides that every such action shall be brought by and in the names of their personal representatives of such deceased person, for the benefit of the widow, surviving husband, and next of kin of deceased, and the amount recovered shall be distributed according to the law of distribution of personal property left by persons dying intestate.

Section 229 of the Practice Act of 1903 provides that a defendant shall recover costs against the plaintiff whenever the plaintiff shall be non prossed or non-suited or judgment shall pass against him, "except against executors or administrators prosecuting in the right of their testators or intestates."

In its brief, appellant contends that executors or administrators suing under the "Death Act," who shall fail in their action for any of the above reasons are not exempt from costs because they are not "prosecuting in the right of their testators or intestates" (Point IV., page 3, of appellant's brief).

POINT I.

We contend that such executor or administrator does prosecute in the right of his testator or intestate.

While it is well established by authority that the action given is an action created by the statute, not known to the common law, nevertheless it is an action arising in the lifetime of the intestate, consummated by his death, and enforcible for the benefit of a special class. The very right of recovery depends upon the fact as to whether or not the decedent in his lifetime would have been able to recover if death had not intervened. And indeed,

the cause of action is one which so clearly arose in the lifetime of the decedent as to be subject to defeat either by the contributory negligence of the decedent or by his contractual relation, whereunder persons designated in the statute would be barred of right of recovery. In other words, no right of recovery exists to the specified persons unless such right of recovery would have existed to the deceased, if death had not occurred. It is unnecessary to cite cases in support of this proposition, of which there are a number in New Jersey.

The statue likewise designates the person in whose name the suit shall be brought, and has cast that burden upon the executor or administrator of the deceased, who has no interest in the controversy except as representing, through the deceased, the classes designated in the statute. This statue was orginally passed in 1848, from which time down to the present the courts have held that costs were not taxable against unsuccessful executors or administrators suing thereunder.

The statutory provision of the Practice Act preventing their taxation against administrators, &c., was embodied in the Practice Act of 1874 (Revision, page 890, Section 266) so that with both these statutes before them for a period of upwards of fifty years, the established practice of the Courts has been not to permit these costs to be taxed, and indeed the interpretation placed upon them has been that they were not taxable.

The brief of appellant seems to concede this but contends that this ancient error of interpretation or practice should now be corrected. We contend that there is no error in interpretation, but that the action is brought by such administrators in the right of their intestates, because the very crux of

the action depends upon the right of action which existed in intestate prior to death.

Irrespective of the statutory inhibition, the pre-existing legal rule was that costs would not be imposed against unsuccessful plaintiff administrators or executors who sued in *autre droit.*

In Norcross v. Boulton, 16 N. J. L., 310, Chief Justice Hornblower said: "The reason for the exception is not simply because executors and administrators are only trustees and acting in *autre droit*, but because they cannot be presumed to be fully acquainted with the transactions of their testators or intestates, and to know their respective rights and duties." The exception to which he refers is an exception to the practice of the Courts to allow costs to the successful party, and this independent of statute.

At common law, costs, *eo nomine*, were never given to either party in any actions whatsoever, but in reality they were awarded as damages and were assessed by the jury and subsequently were assessed by Justices and became taxable as costs only after the passage of the Statute of Gloucester (6 Edw., 1 c., 1), and, where not controlled by statute, are within the equitable power of the Court (Allen vs. Shurts, 17 N. J. L., page 188, wherein Chief Justice Hornblower gives a history of the allowance of costs).

Not in all cases, therefore, were plaintiff-administrators free from liability for costs, as where they charged the wrong as being done to *themselves* and failed (opinion of Justice Ford in Norcross v. Boulton, pages 315 and 316), or where the suit is clearly groundless or vexatious (Gifford v. Thorn, 9 Eq., 702), or where it is brought in bad faith or through negligence (Shepard v. McClain, 18 Eq., 131).

In Gifford vs. Thorn, at page 725, Chief Justice Green said, "The general rule in equity (as well as at law) is that persons suing in *autre droit* are not responsible for costs."

With this established rule of both courts of law and equity before it, the Legislature enacted the legislation above mentioned, placing upon the executor or administrator of an intestate the burden and duty of bringing the statutory Death Action, not for the benefit of the plaintiff, but for the benefit of the widow and next of kin.

The Legislature knew of the established rules of practice absolving plaintiff executors and administrators from liability for costs, and under what circumstances.

Did the Legislature intend to change these rules and practice and fasten upon the executor or administrator the duty of instituting suits under the "Death Act" at his peril, and make him the judge of the propriety of bringing such suit in which he has no pecuniary interest and in which the estate represented by him has none, and, on failure, penalize him or his estate for a mistake in judgment, if it shall appear that the wrongful act, neglect or default complained of was such that the deceased could not have recovered if the suit had been brought by him in his lifetime?

We contend that such was not the legislative intent, but on the contrary, the Legislature, recognizing the established rules and practice of the courts, designated the personal representative of the deceased as the party who should institute such suits, intending if he should fail in his efforts to secure the rights of others—the widow and next of kin—that such failure should not be followed by the penalty of costs, because he was suing in a rep-

resentative capacity, and could not be presumed to be fully acquainted with the transactions of the intestate leading up to the death-producing act.

Appellant's brief does not suggest that these suits are not brought in a representative capacity, but simply argues that they are not brought "in the right of the intestate."

We contend that they brought "in the right of the intestate," although not for the benefit of his estate, because the right of recovery in the representative depends solely upon the right of recovery of the intestate, if death had not occurred.

The case of Kinney et al., administrators, vs. Central Railroad Company (5 Vroom, 273) was decided by the Supreme Court in 1870, after the passage of the "Death Act," and after the passage in 1846 of an Act to regulate fees and costs (Nixon's Digest, Title "Fees and Cost," page 274, Section 11) which, in substantially the same form, has been re-enacted under another title, from time to time, since that date and is now embodied in our present Practice Act. If the interpretation placed upon these statutes by the Supreme Court in the Kinney case was incorrect and not according to legislative intendment, can it be supposed that the Legislature would have re-enacted the misinterpreted section in acts bearing another title, as "An Act to regulate the practice of courts of law," in 1874 (Revision, page 890, Section 266), and again in 1903 (Revision of 1903, 3 Comp. Stat., page 4123, Section 229) and have re-affirmed it in the Practice Act of 1912.

Not only has the Legislature not seen fit to correct this erroneous interpretation of its statutes, but the Kinney case has been cited as authority to the Supreme Court, and to the Court of Errors, down to the present time.

If the Legislature, by the "Fees and Costs" Act of 1846 and the subsequent Practice Acts, intended to do other than declare the common law rule, it was to remove the discretionary power of the Court in awarding costs so far as it permitted costs to be awarded against executors or administrators suing in the right of their testators or intestates, and in that particular placed an inhibition against the exercise of such discretion by Courts of law. This was called an arbitrary rule, established by statute, in the opinion of Chancellor Zabriskie, in Shepard vs. McClain, 18 Eq., 131.

With this arbitrary statutory rule before it, the Legislature enacted the "Death Act" and imposed the burden of suit thereunder upon the executor or administrator of the deceased. We submit that it clearly did not intend to repeal or alter this arbitrary rule, but deliberately intended to exempt the plaintiff in such suits from liability for costs.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed, with costs.

WARREN DIXON,

Of Counsel with Respondent.

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Notice of Appeal.

(Filed July 28, 1917.)

NEW JERSEY SUPREME COURT.

ALFRED H. ELLIS, Administrator, &c., of Robert J. Ellis, deceased, *Plaintiff-Respondent*, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant-Appellant.*	Action at Law.

To:

WARREN DIXON, ESQ.,
Attorney of Plaintiff.

TAKE NOTICE: That the defendant appeals to the Court of Errors and Appeals of the State of New Jersey, from so much of the judgment entered in this cause as adjudges that said judgment shall be without costs, on the following grounds:

1. Said judgment should have allowed costs to the defendant against the plaintiff.

2. The defendant upon the entry of judgment of non pros was entitled to recover its costs against the plaintiff Alfred H. Ellis, as administrator of Robert J. Ellis, deceased.

3. The Supreme Court erred in denying costs to defendant upon the entry of judgment of nonsuit against plaintiff.

4. So much of said judgment as denied costs to defendant is erroneous, illegal and invalid, and should be vacated with the direction to said Supreme Court to allow costs to defendant upon the

entry of the judgment of non-pros against plaintiff as administrator as aforesaid.

Dated July 17, 1917.

VREDENBURGH, WALL & CAREY,
Attorney for Deft.-Appellant.

(Indorsed)

State of New Jersey,
County of Hudson, } ss.:

Grover J. Carey, of full age, being duly sworn according to law, upon his oath says, that on July 18th, 1917, he served a true copy of within Notice of Appeal on Warren Dixon, by handing the same to him personally at his office No. 1 Montgomery Street, Jersey City, New Jersey.

GROVER J. CAREY.

Sworn to and subscribed this 25th day of July, A. D., 1917, before me

Chas. J. Gormley,
Notary Public of New Jersey.
(Seal)

Complaint.

(Filed April 3, 1914.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

ALFRED H. ELLIS, Administrator, &c., of Robert J. Ellis, deceased,
Plaintiff,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

Plaintiff residing at Edgewater, New Jersey, says that:

1. Defendant is a corporation carrying on the business of railroading in the State of New Jersey, and in connection with its said business, on the dates herein mentioned, was the owner, possessor, manager and operator of certain property with railroad tracks and appliances and certain railroad cars and locomotives operated thereon, located at Trenton, New Jersey, contiguous to a certain waterway or canal used for the passage of canal boats and other vessels.

2. Said railroad property adjoined said canal, or said waterway, on the west, and was located between said canal or waterway and certain buildings used as places for supplying provisions and groceries to persons having occasion to purchase the same for use upon said canal boats and other boats using said waterway.

3. Defendant, in connection, with its business, provided upon its said property, adjacent to said canal or waterway, a certain space with appliances for receiving canal boats and other vessels using said waterway, where the same were made fast to the property of said defendant for the purpose of the business of said defendant Railroad, and of said boats, from which the said defendant Railroad Company received monies as toll charges for the privilege of so fastening said boats to said property of the defendant, in order that the said crews of the said canal boats might be provisioned from the stores above set forth and for other lawful purposes in connection with their business.

4. Said defendant provided a way from the place where said boats were tied up to the property of the defendant across the tracks of said defendant to the said stores, and invited persons upon said boats, who might have occasion to use the same, to so use the same for the purpose of obtaining provisions and for other lawful purposes.

5. On the 7th day of June, 1913, Robert J. Ellis was one of a crew of a certain canal boat which had tied up to the wharf or place assigned by the said defendant upon its property aforesaid, and for which the said boat had paid its toll to said Railroad Company in pursuance of the business of said boat and said defendant Company, and was passing from said boat over said Railroad yard of the said defendant, upon the way provided by it, to the grocery store above mentioned, for the purpose of securing provender to be used upon said boat, and in the passage over said property was obliged to cross a number of railroad tracks of said defendant Company, and while crossing

one of said tracks, a certain train of cars operated and managed by said defendant Company, was suddenly started up and backed upon and against the said Robert J. Ellis, and ran over and killed him.

6. Said train of cars above mentioned, was started and backed upon and over said Robert J. Ellis, when he was in and upon the said tracks, without any warning by signal or otherwise of the anticipated starting of said train, and suddenly ran against and over said Robert J. Ellis, before he could escape from said tracks upon which the same was being run.

7. No person was stationed upon said train or near thereto for the purpose of furnishing any warning to said Ellis of the intended starting of said train, or to notify him of the danger to be encountered from said starting.

8. Said Robert J. Ellis was then and there killed by reason of being struck and run over by said train operated and managed by said defendant as aforesaid, through the negligence of the said defendant, and without any negligence upon the part of the said Robert J. Ellis in any manner contributing thereto, and then and there died, leaving three brothers and five sisters, his next of kin.

9. The said Robert J. Ellis, in his lifetime, and until his death, contributed to the support of said next of kin in large sums of money.

10. Plaintiff is a brother of the said Robert J. Ellis, deceased, and was granted letters of administration upon the estate of said Robert J. Ellis,

deceased, by the Surrogate of Bergen County, the 21st day of March, 1914.

11. Plaintiff brings this suit for the benefit of the next of kin of the said Robert J. Ellis, deceased.

Plaintiff demands $10,000 damages.

WARREN DIXON,
Plaintiff's Attorney.

Answer.

(Filed April 21, 1914.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

ALFRED H. ELLIS, Admr., &c., of Robert J. Ellis, deceased, *Plaintiff*, *vs.* PENNSYLVANIA RAILROAD COMPANY, *Defendant.*	Action at Law.

Defendant, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having an office and place of business at No. 26 Exchange Place, in the City of Jersey City, County of Hudson and State of New Jersey, says that—

It denies the truth of the matters set forth in the complaint.

SECOND DEFENSE.

Plaintiff's intestate was a trespasser upon the property of defendant at the time of the injury complained of, to whom defendant owed no legal duty except to refrain from willful or wanton injury, and was injured without the fault of the defendant, while he was crossing the tracks of said defendant's railroad, without taking reasonable precautions for his own safety, thereby contributing to his own injury.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

Reply.

(Filed May 1, 1914.)

NEW JERSEY SUPREME COURT.

ALFRED H. ELLIS, Administrator, &c.,
Plaintiff,

vs.

PENNSYLVANIA R. R. Co.,
Defendant.

Plaintiff denies every allegation in the answer.

WARREN DIXON,
Plaintiff's Attorney.

Notice of Motion to Non Pros.

(Filed February 14, 1917.)

NEW JERSEY SUPREME COURT,

BERGEN COUNTY.

ALFRED H. ELLIS, Administrator, &c., of Robert J. Ellis, deceased, *Plaintiff,* *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant.*	Action at Law.

TO WARREN DIXON, Esq.,
Attorney of Plaintiff:

TAKE NOTICE, that on Tuesday, February 20th, 1917, we will move before the above stated Court, at the State House in the City of Trenton, at the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel may be heard, for a judgment of non pros, with costs, in the above stated case, because of plaintiff's failure to notice the cause for trial at the December Term, 1916, of the Bergen Circuit.

Dated February 10, 1917.

Yours, &c.,
VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

(Endorsed).

Service of within Notice acknowledged this 10th day of February, 1917.

(Signed) WARREN DIXON,
Attorney of Plaintiff.

Opinion of the Supreme Court.

(Filed June 28, 1917.)

NEW JERSEY SUPREME COURT,

February Term, 1917.

ALFRED H. ELLIS, Adm'r.,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

Submitted May 28, 1917.

Decided June 28, 1917.

1. In an action brought by an administrator under the "Death Act" a motion to non pros, if granted is without costs against the plaintiff.

2. The case of Kinney, Adm'r. v. C. R. R. Co. (34 N. J. L.) followed.

On motion to non pros.

Before Justices Garrison, Parker and Bergen.

For the motion, John A. Hartpence, Esq.

Contra., Warren Dixon, Esq.

The opinion of the Court was delivered by GARRISON, *J.*:

"This is a motion for non pros, and for the allowance of costs in favor of defendant against the plaintiff, who is an administrator suing under the 'Death Act'. The Court granted the non pros, but reserved the question of costs, with leave to defendant to submit a memorandum in support of the application therefor against the administrator, which has now been handed to the Court.

In his memorandum counsel frankly admits that in the case of Kinney v. C. R. R. Co. (34 N. J. L., 1870), this Court decided that a defendant could

not recover costs against an administrator in an action brought under the "Death Act." He also admits that for nearly fifty years this rule has been applied in this court. He then argues with much force that the rule is wrong for the reason that the administrator does not sue in the right of his intestate, but in the right of statutory beneficiaries. We express no opinion as to whether the original decision of this question was correct or not, for the reason that it is the judicial habit of this Court under the circumstances now before us to follow its own previous decision, leaving it to the Court of Errors and Appeals to review the legal merits of such decision.

The rule of non pros may be entered without costs.

Judgment of Non Pros.

(Entered June 30, 1917.)

NEW JERSEY SUPREME COURT.

ALFRED H. ELLIS, Administrator, &c., of Robert J. Ellis, deceased, *Plaintiff*, *vs.* THE PENNSYLVANIA RAILROAD COMPANY, *Defendant.*	Action at Law.

Due notice of this motion having been given to the attorney of the plaintiff, pursuant to the rules and practice of this Court; and the Court being now of the opinion that said motion should be granted without costs,—

IT IS ORDERED, that judgment of non pros. be and the same hereby is entered against the above named plaintiff and in favor of the above named defendant, but without costs.

Entered June 30, 1917.

On motion of

VREDENBURGH, WALL & CAREY,
Attorneys of Defendant.

Whereupon it is adjudged that the complaint of the plaintiff Alfred H. Ellis, Administrator &c. of Robert J. Ellis, deceased, be dismissed, without costs.

Judgment entered June 30, 1917.

WM. S. GUMMERE,
C. J.