

New Jersey Court of Errors and Appeals

HACKENSACK TRUST COMPANY,
 administrator of the estate
 of Florence K. Dartnell,
 deceased,

Plaintiff and Appellant,

vs.

EVA VAN DEN BERG, administra-
 trix of the estate of Wynand
 Van den Berg, deceased,
Defendant and Respondent.

*Action at
 Law.*

In Tort.

*On Appeal
 from
 Supreme
 Court.*

Brief for Defendant and Respondent.

Facts.

On the evening of the first day of January, 1915, Wynand Van den Berg, a resident of the Borough of Tenafly, in the County of Bergen in the State of New Jersey, while engaged in transporting Florence K. Dartnell from her residence on Hickory avenue in said Borough to a public hall at Tenafly near the railroad depot at that place, in his automobile, a Ford Sedan, and while crossing the tracks of the Erie Railroad Company at Jay street in said Borough, was struck by a train of the Erie Railroad Company and both he and his passenger were instantly killed.

That on the twelfth day of January, 1915, the Surrogate of the County of Bergen, issued letters of administration of the estate of the said Wynand Van den Berg to the said Eva Van den Berg, and thereafter she qualified and took

upon herself the administration of the estate (case, pp. 11-20).

That on the twelfth day of January, 1915, the said Eva Van den Berg as such administratrix was directed by an order of the Surrogate of the said County of Bergen to give public notice to the creditors of the decedent, to bring in their debts, demands and claims against the same, under oath, within nine months from the date of said order, by setting up such notice in five of the most public places of the County of Bergen for the space of two months and advertising the same for a like period in the Bergen County Record, one of the newspapers of this state; and that such notice should be given and advertised within twenty days from the date of said order. (See case, p. 48, Exhibit D. 1, for defendant.)

That such order was fully complied with. (See case, p. 48, Decree, Exhibit D. for defendant.)

That the administrator of Florence K. Dartnell or any one on behalf of her estate never filed any claim against the estate of Wynand Van den Berg, deceased, previous to October 20th, 1915. (See case, p. 28, l. 30.)

That the order barring creditors was signed by W. M. Seufert, Judge, on the twentieth day of October, 1915. (See case, p. 28, l. 40.)

At the conclusion of the cause the attorney for the defendant and respondent, Eva Van den Berg, moved for a direction to the jury to find a verdict in favor of the defendant, Eva Van den Berg, upon the ground that the plaintiff and appellant was barred from maintaining said suit by reason of the proceedings above set out, and the Court so determined and gave the jury

directions as requested. (Case, p. 42, ll. 26-30; also p. 43, l. 40.)

That the jury brought in a verdict in favor of the defendant and appellee upon the grounds above stated as directed by the Court, and this Court is now asked to determine whether or not that verdict was proper and legal.

POINT I.

The verdict of the jury in favor of the defendant and appellant and against the plaintiff and appellee was legal, right and proper and was justified by the statute and the law. (See Compiled Statutes, Vol. 3, p. 3833, §67, 68, 69, 70.)

Purpose of Statute.

“The object of the statute is to inform the personal representatives of the claims, which may be outstanding against the estate of their decedent, that they may know how to administer it and not be subject to suits after they have disbursed all the assets.”—Kocher’s Edition of 1916, p. 559. (Ref.) *Smith v. Wilson*, 79 N. J. Eq., pp. 310-314; *Ryan v. Flannigan*, 38 N. J. L., pp. 161-164; 24 Vroom, pp. 307-309; 33 Vroom, 491-493.

The language of the statute; 3 Compiled Statutes, p. 3833, §67, is as follows:

“The Orphans’ Court or the Surrogate of the proper County, is hereby empowered to order executors and administrators to give public notice to the creditors of the decedent to bring in their *debts, demands and claims* against his estate under oath within nine months from the date of such order.” * * *

It may be argued that the words debts, demands and claims do not include unliquidated claims or demands. This contention, I think, cannot be successfully maintained upon an examination of the authorities that have passed upon the question. In *Smith v. Wilson*, 79 N. J. Equity, pp. 310-315, Vice-Chancellor Stevenson says:

“The opinion of Mr. Chief Justice Beasley in *New Jersey Insurance Co. v. Meeker*, 37 N. J. Law (8 Vr.), p. 282, exhibits the wide range of the meaning of the word ‘creditor,’ according to the nature and object of the statute in which the same is used.

In that case the remedial statute, entitled an act for the relief of creditors against ‘heirs and devisees’ was held to use the word ‘creditor’ in a broad sense so as to give the benefit of the act to a party holding a right of action on account of a covenant against encumbrances. I am unable to perceive any reason why in view of the object of the statute in question all parties holding claims against the estate which may in future be put in judgment against the executor or administrator, however contingent they may be, should not be deemed ‘creditors’ or holders of obligations of some sort against the estate, are not merely called upon to bring in their ‘debts,’ but their ‘demands’ and their ‘claims.’ ”

P. 321. Mr. Justice Van Syckel (43 N. J. Eq., 16 Stewart, p. 639), speaking for the entire Court of Errors and Appeals discusses the effect of the act of March 12, 1880, as amended in 1881, upon “bond and mort-

gages given for the same indebtedness," by a decedent, whose estate was before the Court, and he says (at page 639), "The Act of 1881 prohibits suit on the bond until the sale is made under the decree of foreclosure, *but does not prevent the creditor from presenting his claim to the administrator under the rule to bar.* If not presented within the time so limited it can not be presented at all. The object of said act is to compel the mortgagee to look primarily to the mortgaged premises for payment, and to limit the time for suing for deficiency to six months from date of sale."

The claim in such case, must necessarily be uncertain and may never exist at all, yet in order not to be barred by the provisions of the statute the claim must be presented within the prescribed time. Evidently it was the intent of the Legislature to include in the phraseology used sufficient words to include such a right as was involved in this case. The word debt would hardly comprehend it, but there can be no question but that either of the words claim or demand would.

See *Black's Law Dictionary*, p. 350 (Demand) Do., p. 204 (Claim).

All statutes must be general in form and could be so drawn as to meet every contingency that might arise, such as might arise from war, non-residence, etc.

If conditions do arise that are not provided for it must be attributed to the unfortunate condition of the person who cannot comply; the statute cannot be construed with such liberality as will meet the situation.

Great complaint is made of the action of the Orphans' Court of the County of Bergen, and while it would seem to have no connection with the case now before the Court should have some reply.

Before the expiration of a year from the death of Wynand Van den Berg, the plaintiff cited his administratrix to file an account, not having done so before, because all claims had not been collected and because of this suit for the recovery of damages, the account was immediately prepared and filed. The plaintiff filed 53 exceptions. A motion was made to strike them out upon the ground that the plaintiff *was not a creditor or a party in interest* as required by the statute, because they had not filed any claim before being barred, and therefore had no right to file exceptions. The Court determined that their remedy, if any, was under the §80 of the Orphans' act. *The exceptions were dismissed.*

POINT II.

The fact that Orphans' Court Act above referred to Vol. 3, Compiled Statutes, p. 3833, §67, provides that all claims not filed within nine months will be barred, while the Death Act provides that any suit under its provisions must be brought within two years after death is no argument that because the time fixed in each instance is of different length, that for that reason the Orphans' Court Act was not intended to cover unliquidated claims.

The cause of action arose in this case immediately on the death of Florence K. Dartnell if her representative had any on January 1st, 1915, and if a claim existed was as well known then as at any time. Letters of Administration were taken out on the 19th day of February, 1915.

A suit was instituted against the Erie Railroad alone January 16th, 1916, and against the Erie Railroad Company and Eva Van den Berg, administratrix of Wynand Van den Berg after discontinuing first suit on January 24th, 1916, by the administrator of Florence K. Dartnell, deceased.

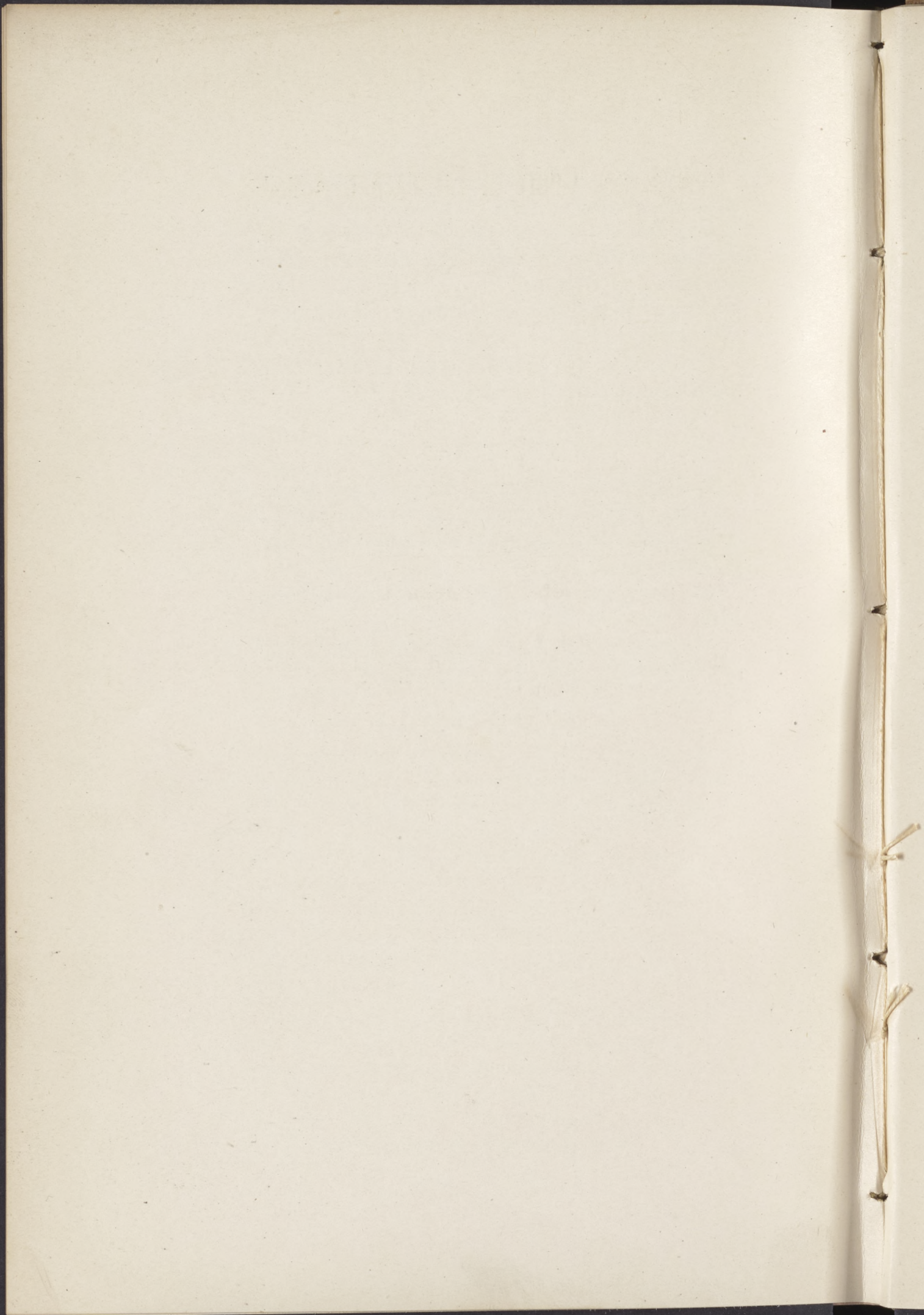
No claim was presented to the defendant and respondent until March 17th, 1916.

POINT III.

A claim presented after the entry of decree barring creditors could have no force or weight so far as barring was concerned after the entry of same.

The decree barring was entered October 20th, 1915.

The judgment of the Supreme Court should be affirmed on grounds herein stated.



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Brief for Appellant.

The facts upon which this appeal is based are the same as in the other and preceding appeal, and hence need not be recited here.

The grounds of appeal are as follows:

1. That the Court adjudged that the cause of action particularly set out in the pleadings in said cause survived against Eva Van den Berg, administratrix of Wynand Van den Berg, deceased, after his decease.

2. That the Court denied the motion to dismiss the said action against the defendant and appellant, upon the ground that the said action did not survive as against her.

POINT I.

We claim that upon the death of the said Wynand Van den Berg, at the same time as the said Florence K. Dartnell, the right of action did not survive against his representatives.

13 Cyc., page 328, Sec. 7, subdivision (b), title on death of defendant.

“The better rule seems to be that where a statute gives the right of action for death by wrongful act, such action abates on death of defendant therein.”

Arkansas, *Davis v. Nichols*, 4 Ark. 358.

Indiana, *Hamilton v. Jones*, 125 Ind. 176.

Minnesota, *Green v. Thompson*, 26 Min. 500.

New York, *Moriority v. Bartlett*, 99 N. Y. 651.

New York, *Hegerich v. Keddie*, 99 N. Y. 258.

New York, *Pessini v. Wilkins*, 54 N. Y. Supt. Ct. 146.

New York, *Norton v. Wiswall*, 14 N. Y. How. Pr. 42.

Ohio, *Russell v. Sunbury*, 37 Ohio St., p. 372.

Pennsylvania, *Moe v. Smiley*, 125 Pa. St. 136.

Pennsylvania, *Weiss v. Hunsicker*, 3 Pa. Dist. 445.

Texas, *Johnson v. Farmer*, 89 Tex. 610.

New Jersey, *Cooper v. Shore Electric Co.*, 63 L., pp. 558-559; decided Nov. 20, 1899.

In the last named case, Justice Depue says among other things as follows:

“By the common law, *actio personalis moritur cum persona*, and the death of the sole plaintiff or sole defendant, before final judgment, abated a personal action. The principle upon which this rule is rested, was that the cause of action did not survive to the personal representatives of the deceased person.”

Do. p. 560. "The first departure from the common law rule (4 Edw. C. 7), gave *executors* an action for *trespass for injuries to the goods and chattels of their testator.*"

"This was subsequently extended by construction to administrators, and to actions on the case and actions of *assumpsit* in simple contracts. The statute of Edward III did not extend to actions for injuries to the person or to the testator's freehold. The latter causes of action were left subject to the common law rule."

"This common law situation was further modified by the act of March 17th, 1855. The efficient words in this statute are, '*trespass to the person, or property, real or personal.*'"

Do. page 561, "*This act (1855, p. 340) did not give a remedy for injuries resulting from the death of a person. This imperfection was remedied by the act under which this suit was brought. (1848, March 3rd.)*"

Quoted in 6 N. J. L., p. 61—And this conclusion arrived at:

"These cases, we think fully support the proposition that where the right of action exists in the injured party at the time of his death, where he has done no act to bar a suit for himself if he had survived, then the right of action, under the statute, is a vested right in those who are the beneficiaries."

"This must be accepted as the rule of this state under the decision of the Court of Errors and Appeals in *Cooper v. Shore Electric Co.*, reported in 34 Vroom, p. 558."

While the language used by the learned Judge does not clearly state the position as to time of the two statutes referred to, he very clearly indicates that the statute of 1855, did not give a right to sue for damages for the death of any person and only the death act of 1848 did.

The Death Act, Laws of 1848, page 151, as amended, will be found in Compiled Statutes, Vol. 2, p. 1907, Section 7, and reads as follows:

“Death by wrongful act, damages recoverable” 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 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 a felony.*”

There is not a word in this act that would justify the conclusion that any right is given to sue any other than the person or the corporation who has done the injury. No provision is made for bringing the action against an executor or administrator of such person. This statute is an innovation of the common law and should be construed strictly and nothing added thereto by any lax interpretation of the same.

It has been suggested that Section five relating to executors and administrators (Compiled Statutes, p. 2260), remedies this condition, but it will be seen upon comparison that this section of the statute is in almost the same language that is

contained in the act of 1855, p. 340, above referred to, and is construed and adjudicated upon in *Hayden v. Vreeland*, 37 Law, p. 372, and emphasizes the conclusion arrived at by Justice Depue in *Cooper v. Shore Electric Co.*, 34 Vroom, p. 558, wherein he says "that the Act of 1855, p. 340, did not give a remedy for injuries resulting from the death of a person."

If the Act of 1855, p. 340, did not apply to the kind of action involved in this case, then neither did the Executor's Act, Compiled Statutes, p. 2260, Sections four and five, almost in the same language, but only applied to actions brought by executors and administrators for the benefit of their testators' estate.

The Death Act created an entirely new cause of action in which the executors or administrators were merely the machine, which was to be made use of for the benefit of the widow and next of kin of the deceased and in which they had no personal interest for the benefit of the estate of their testator or intestate. 72 N. J. Law, pp. 480-484; Encyclopedia of Law Procedure, Vol. 13, p. 380; *Centofonte v. Camden Coke Co.*, 78 N. J. L. 662, at 668 and 669. *Cooper v. Shore Electric Co.*, 63 N. J. Law, 558.

Whereas, as before stated, the Executors' Act applied only where the damages to be recovered were for the benefit of the testators' estate or the trespasser had derived some benefit from the trespass and upon his decease his estate should respond in damage.

The cases cited by the plaintiff and appellant as follows:

- Tichenor v. Hayes*, 41 N. J. Law, p. 193.
- Alpaugh v. Conkling*, 88 N. J. Law, p. 64.
- Hackensack Trust Co., Adm. v. Erie, et als.*, 88 N. J. Law, p. 518.

Ten Eyck v. Runk, 31 N. J. L., p. 428.

Hayden v. Vreeland, 37 N. J. Law, p. 378.

Noice v. Brown, 39 N. J. Law, p. 571.

are all cases in which the trespasser testator's estate supposedly had been benefited, by such trespass as is mentioned in said Executors' Act, and that the injured testator's estate which had been damaged, should be in no worse condition upon the death of the trespasser than if he were alive, and therefore his executors or administrators might bring suit against the representatives of the deceased trespasser. But that this act would not apply where the executors or administrators were simply acting as trustees for the benefit of the testator's next of kin and not for the benefit of his estate. It is claimed that not a single case can be found in this state where an action under the Death Act has been brought by the executors or administrators of the deceased against the executors or administrators of the trespasser.

The Court should upon the grounds stated, determine that the action did not survive as against the administratrix of Wynand Van den Berg, deceased.

Respectfully submitted,

R. P. WORTENDYKE,

*Attorney for Defendant and Respondent,
and Defendant and Appellant, Eva Van
den Berg, administratrix of Wynand Van
den Berg, deceased.*

HAMMERMILL

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