

[HIGH COURT OF AUSTRALIA.]

PARTRIDGE APPELLANT ;
PLAINTIFF,

AND

CHICK RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Tort—Negligence—Fatal accident—Death of wrongdoer before that of injured person H. C. OF A.
—Action against estate of wrongdoer—Administration and Probate Act 1928 1951.
(No. 3632) (Vict.), s. 25—Survival of Actions Act 1942 (No. 4918) (Vict.),*
s. 2—Wrongs Act 1928 (No. 3807) (Vict.), ss. 15, 16.**

MELBOURNE,
Oct. 4, 5;
Nov. 5.
—
Dixon,
Williams,
Webb,
Fullagar and
Kitto JJ.

Where the death of A is caused by the wrongful act, neglect or default of B which is such as would (if death had not ensued) have entitled A to maintain an action and recover damages in respect thereof and B dies before A, the effect of the *Administration and Probate Act 1928* (Vict.), s. 25 (1), (6) (as enacted by the *Survival of Actions Act 1942* (Vict.), s. 2), is that an action will lie under s. 15 of the *Wrongs Act 1928* (Vict.) for the recovery from the estate of B of damages in respect of the death of A.

Decision of the Supreme Court of Victoria (*Lowe A.C.J.*) reversed.

* The *Administration and Probate Act 1928* (Vict.), s. 25, is amended by the *Survival of Actions Act 1942* (Vict.), s. 2. The amendment consists in the substitution for the former sub-ss. (1), (2), (5)-(7), of s. 25 of the following provisions: “(1) Subject to the provisions of this section, on the death of any person after the commencement of the *Survival of Actions Act 1942*, all causes of action subsisting against or vested in him shall survive against or (as the case may be) for the benefit of his estate: Provided that this sub-section shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims under

Part IV. of the *Marriage Act 1928* for damages on the ground of adultery. (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person the damages recoverable for the benefit of the estate of that person—(a) shall not include any exemplary damages; (b) in the case of a breach of promise of marriage shall be limited to such damage (if any) to the estate of that person as flows from the breach of the promise to marry; (c) where the death of that person has been caused by the act or omission which gives rise to the cause of action—(i) shall be calculated without reference to any loss or gain to his estate consequent on his death, except

H. C. OF A. APPEAL from the Supreme Court of Victoria.

1951.

PARTRIDGE

v.

CHICK.

In an action in the Supreme Court of Victoria by Ruth Ellen Partridge against Walter Thomas Chick, the plaintiff's statement of claim was substantially as follows:—

1. The plaintiff is the widow of George Frederick Partridge deceased late of Wangaratta South in the State of Victoria and brings this action as administratrix of the estate of the deceased for her own benefit and for the benefit of Ruth Elaine Partridge, Marion Lorraine Partridge, Ronald George Partridge, Jillian Mary Agnes Partridge and John Graeme Partridge, all of whom are infants and the lawful children of the plaintiff and the deceased.

2. The defendant is sued in his capacity as the administrator of the estate of Leslie Frederick Chick deceased late of Wangandary near Wangaratta aforesaid, letters of administration of the estate having been duly granted to him by the Supreme Court of Victoria in its probate jurisdiction on 14th June 1950.

3. Letters of administration of the estate of George Frederick Partridge deceased were duly granted to the plaintiff by the

that a sum in respect of funeral expenses may be included; (ii) shall not include any damages for his pain or suffering or for any bodily or mental harm suffered by him or for the curtailment of his expectation of life. . . .

(5) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of sub-section (1) of this section has survived against the estate of a deceased person unless either—(a) proceedings against him in respect of that cause of action were pending at the date of his death; or (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation.

(6) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage is suffered there shall be deemed for the purposes of this section to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered. (7) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation from any

rights conferred on the dependants of a deceased person by Part III. of the *Wrongs Act* 1928 as amended by any Act, and this section shall apply in relation to causes of action under the said Part III. as so amended as it applies in relation to other causes of action not expressly excepted from the operation of sub-section (1) of this section."

Sections 15 and 16 of the *Wrongs Act* 1928 (Vict.) are in Part III. (ss. 14-20) of the Act. Part III. has been the subject of amendment, but not as to the text of s. 15 or s. 16. By s. 15 and (so far as here material) s. 16 it is provided: "15. Whensoever the death of a person is caused by a 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 has been caused under such circumstances as amount in law to felony. 16. Every such action shall be for the benefit of the wife husband parent and child of the person whose death has been so caused."

Supreme Court of Victoria in its probate jurisdiction on 13th April 1950. H. C. OF A.
1951.

4. On or about 13th October 1949 a motor car driven by Leslie Frederick Chick deceased came into collision with a bicycle ridden by George Frederick Partridge deceased at or near the intersection of Tone and Vincent Roads Wangaratta aforesaid. PARTRIDGE
v.
CHICK.

5. The collision was caused by the negligence of Leslie Frederick Chick deceased.

6. As a result of the collision George Frederick Partridge deceased and Chick deceased each received injuries from which each died on 14th October 1949.

7. Up to the time of the death of George Frederick Partridge deceased the plaintiff and the children named in par. 1 resided with and were dependent for their support upon George Frederick Partridge deceased and by reason of his death they have been wholly deprived of such support and have thereby suffered damage.

[Then followed " particulars delivered pursuant to the *Wrongs Act* 1928 " (Vict.).]

The plaintiff claimed £8,500 damages.

The defendant in his defence denied negligence, alleged (in par. 7) that Leslie Frederick Chick predeceased George Frederick Partridge and contended (in par. 10) that the statement of claim did not disclose a cause of action against the defendant.

The plaintiff took out two summonses, dated respectively 14th December 1950 and 13th June 1951, the first seeking an order that par. 10 of the defence be struck out on the ground that it was irregular and tended to prejudice, embarrass or delay the fair trial of the action, and the second asking for a declaration that in point of law pars. 7 and 10 of the defence raised no defence to the action. The summonses coming on for hearing before *Lowe A.C.J.*, it was ordered by consent that they be heard together " and that the application should be heard and dealt with as though the point of law raised by paragraphs 7 and 10 of the defence herein were set down for hearing under " order XXV., r. 2, of the *Rules of the Supreme Court* (Vict.). The matter then proceeded as on a demurrer. It was contended on the plaintiff's behalf that the action was supported by the combined effect of s. 25 of the *Administration and Probate Act* 1928 (Vict.) (as amended by s. 2 of the *Survival of Actions Act* 1942 (Vict.)) and ss. 15, 16, of the *Wrongs Act* 1928 (Vict.). *Lowe A.C.J.* was of the contrary opinion; and—the matter being by consent referred into court—the summonses were dismissed and it was ordered that judgment be entered for the defendant with costs to be taxed.

From this decision the plaintiff appealed to the High Court.

H. C. OF A.

1951.

PARTRIDGE

v.

CHICK.

R. M. Eggleston K.C. (with him *J. E. Starke*), for the appellant. The appellant's action is supported by the effect—when they are read together—of s. 15 of the *Wrongs Act* and the new s. 25 (1) of the *Administration and Probate Act*. Within the meaning of s. 15 of the *Wrongs Act* G. F. Partridge had a right of action which he could have maintained against L. F. Chick if both of them had survived the accident. By virtue of s. 25 (1) of the *Administration and Probate Act* this right of action continued to exist as against the estate of Chick and could have been maintained by Partridge (if he had survived) against Chick's personal representative. This brings Chick's personal representative within the operative words of s. 15 of the *Wrongs Act*, "the person who would have been liable if death" (that is, the death of Partridge) "had not ensued shall be liable" &c. That is to say, the personal representative of Chick, as representing his estate, becomes—by reason of s. 25 (1) of the *Administration and Probate Act*—"the person . . . liable" under s. 15 of the *Wrongs Act*. Alternatively, the action under the *Wrongs Act* can be maintained by virtue of the new s. 25 (1), (6) and (7) of the *Administration and Probate Act*. This case is literally within the words of s. 25 (6). Damage, being the loss of the breadwinner, has been suffered by Partridge's dependants by reason of an act or omission in respect of which they would have had a cause of action under the *Wrongs Act* against Chick if he had not died before that cause of action arose on the death of Partridge. The assumption required by s. 25 (6) is that that cause of action arose before the death of Chick. No reason appears to warrant any limited construction of s. 25 (6) which would exclude this cause of action. The *Wrongs Act* (in ss. 15, 16) is concerned with an action for damages; it is not concerned with some other kind of relief. *Lowe* A.C.J. gave an unduly restricted meaning both to s. 25 (6) and—in considering whether it assisted the interpretation of that sub-section—to s. 25 (7). The latter contains two distinct provisions; the second of these is in quite general terms; it has not a limited purpose, as *Lowe* A.C.J. thought. Accordingly, it supports the construction of s. 25 (6) for which the appellant contends; in fact, it requires that s. 25 (6) should not be "read down" so far as actions under the *Wrongs Act* are concerned.

R. A. Smithers, for the respondent. The appellant's first contention seeks to give to s. 15 of the *Wrongs Act* (in particular, to the expression "person who would have been liable" &c.) an artificial construction which the section will not bear. That section

is concerned with the death of the person injured, not with that of the wrongdoer. The preamble to *Lord Campbell's Act* (Imp.) (9 & 10 Vict., c. 93) shows that what it was concerned to meet was the fact that a wrongdoer escaped liability when the injured person died. This is met by the creation of an entirely new and distinct form of action (*Grein v. Imperial Airways Ltd.* (1); *British Electric Railway Co. Ltd. v. Gentile* (2); *Seward v. "Vera Cruz"* (3)). It is not suggested that the words "person who would have been liable" &c. do not extend to a person who is vicariously liable for the act of the wrongdoer. What is suggested is that they are not apt to describe the personal representative of a deceased wrongdoer; he is not in any relevant sense a "person . . . liable" within s. 15 of the *Wrongs Act*. If it had been intended to bring him in, one would have expected that quite different words would be used. Where the wrongdoer survives the injured person and then dies, the cause of action in the dependants of the injured person under the *Wrongs Act* has already arisen, and it is a logical result of the scheme of the *Survival of Actions Act* that the cause of action survives as against the wrongdoer's estate. In such a case the personal representative of the wrongdoer is sued, not because he is a "person . . . liable" under s. 15 of the *Wrongs Act*, but because he is the person to sue to enforce the claim against the wrongdoer's estate, which is kept alive by the new s. 25 (1) of the *Administration and Probate Act* as enacted by s. 2 (1) of the *Survival of Actions Act*. The present action—on the footing of the appellant's first contention—has no logical place in the scheme of s. 25 of the *Administration and Probate Act*. It is not easy to see how the limitation of time in s. 25 (5) (b) would operate in relation to such actions. *Lowe A.C.J.* thought that it would not apply. In any event, it does not seem that s. 25 (5) (b) can be given an operation which will not produce anomalies if the appellant's contentions are correct. The new s. 25 (7) does not assist either of the appellant's contentions. Its first branch is concerned merely to ensure that the preservation (for the benefit of his estate) of the right of action which the injured person would have had if he had not died is not regarded as affecting the right of action for the benefit of the dependants under ss. 15 and 16 of the *Wrongs Act*. Its second branch is satisfied by its application to such cases as already mentioned—those in which the wrongdoer dies after the death of the injured person. It does not support the construction of s. 25 (6) on which the appellant's second contention depends. *Lowe A.C.J.*,

H. C. OF A.
1951.

PARTRIDGE
v.
CHICK.

(1) (1937) 1 K.B. 50.

(2) (1914) A.C. 1034, at p. 1041.

(3) (1884) 10 App. Cas. 59, at p. 70.

H. C. OF A.
 1951.
 {
 PARTRIDGE
 v.
 CHICK.
 —

it is submitted, took the correct view of s. 25 (6). It does not cover the present case, because no cause of action under the *Wrongs Act* subsisted at the time of the death of the wrongdoer. It is concerned with cases in which a cause of action is not complete until damage is suffered—a case, for instance, in which A commits an act which ultimately results in damage to B (which would have given B a cause of action against A) but dies before the damage has occurred. Its purpose is to protect the rights of B. It is not aimed at such causes of action as are created by s. 15 of the *Wrongs Act*. If, literally, its words are wide enough to cover the present case, the result is entirely fortuitous. It should not be assumed that the legislature intended to subject a deceased person's estate to a claim arising from a death which does not occur until, it may be, a very long time after his own death—long after his estate has been wound up. [He referred to *Woolworths Ltd. v. Crotty* (1).]

R. M. Eggleston K.C., in reply.

Cur. adv. vult.

Nov. 5.

The following written judgments were delivered :—

DIXON, WILLIAMS, WEBB and KITTO JJ. This is an appeal by a plaintiff from an order of the Supreme Court of Victoria made in pursuance of Order XXV., rr. 2 and 3, for the disposal before the trial of a point of law raised by the pleadings. The point of law was decided against the plaintiff and judgment in the action was entered for the defendant.

The appellant plaintiff is a widow whose husband died as a result of injuries received in a road accident. While mounted upon a bicycle he came into collision with a motor car and died next day. His widow obtained administration of her husband's estate and as administratrix she brought the action under *Lord Campbell's Act* (Part III. of the *Wrongs Act* 1928 (Vict.)) for the benefit of herself and five infant children. The accident by which her husband lost his life caused also the death of the driver of the motor car. He too died on the day following the accident, but at an hour earlier than that of the death of the appellant's husband. The defendant in the action is the administrator of the estate of the driver of the car and he is sued in that capacity.

The point of law raised is whether an action under *Lord Campbell's Act* will lie against the personal representative of a deceased person whose death occurred before that of the person in respect of whose

subsequent death the action under *Lord Campbell's Act* is brought. In the Supreme Court *Lowe* A.C.J. decided that the action would not lie.

Clearly enough, before the *Survival of Actions Act* 1942 (Vict.), the death of a wrongdoer put an end to a cause of action against him under *Lord Campbell's Act* if, by the death of the person wronged, it had already arisen and, if the person wronged was still alive, put an end to the cause of action vested in him and so made it impossible for a cause of action to arise under *Lord Campbell's Act* upon his subsequent death. The question upon which the appeal depends is whether the *Survival of Actions Act* 1942 has made it possible to maintain an action under *Lord Campbell's Act* when the order of deaths is first the wrongdoer and then the person wronged. When the order is first the death of the person wronged and then the death of the wrongdoer it is clear enough that under the *Survival of Actions Act* the cause of action against the wrongdoer, having already vested in the relatives of the person wronged and in his legal personal representative for their benefit, survives against the estate of the wrongdoer. But when the wrongdoer dies first and the wronged person survives him and dies afterwards, the latter's relatives and his legal personal representative on their behalf have not upon the death of the wrongdoer any cause of action under *Lord Campbell's Act* to survive his death. Their cause of action can only arise subsequently when the wronged person dies. In the meantime the wronged person, having sustained injuries, has a cause of action which has survived against the wrongdoer's estate and, on the wronged person's death, it will survive him too for the benefit of his estate. But that is not the cause of action under *Lord Campbell's Act*, which is a distinct cause of action to which the relatives are entitled and the legal personal representative suing for their benefit. The basal provision of the *Survival of Actions Act* 1942 is simply that on the death of any person all causes of action subsisting against or vested in him shall survive against or (as the case may be) for the benefit of his estate. By s. 2 this provision is placed in the *Administration and Probate Act* as s. 25 (1). The contention for the respondent is that at the death of the motor-car driver, of whose estate he is administrator, no cause of action subsisted in the appellant or in the relatives of the deceased cyclist, for whose benefit the appellant sues as administrator, for the simple reason that the cyclist was still living. They had no cause of action to survive against the estate of the motor-car driver. There is no statutory provision, says the respondent, which governs this position and operates to vest a

H. C. OF A.
1951.

PARTRIDGE
v.
CHICK.

Dixon J.
Williams J.
Webb J.
Kitto J.

H. C. OF A.
1951.

PARTRIDGE
v.
CHICK.

Dixon J.
Williams J.
Webb J.
Kitto J.

cause of action under *Lord Campbell's Act* in the relatives of the wronged man when the wrongdoer predeceases him.

The question is whether, in a combination of the *Survival of Actions Act* and of Part III. of the *Wrongs Act* (*Lord Campbell's Act*) a statutory provision is not to be found which does so operate. For, if there be none, it is undeniable that the respondent's contention is well founded. It is well settled that the cause of action which *Lord Campbell's Act* gives to the relatives of a man who has been killed is a new cause of action. An essential condition is that his death must have been caused by a wrongful act, neglect or default, and the act, neglect or default must have been such as would (if death had not ensued) have entitled him as a party injured to maintain an action and recover damages in respect of the wrongful act, neglect or default (cf. s. 15 of the *Wrongs Act*). But, while that is an ingredient in the relatives' cause of action, theirs is a fresh cause of action depending upon the prejudice sustained by them in consequence of his death. In *Blake v. Midland Railway Co.* (1) *Coleridge J.* made the statement, often quoted, that the Act does not transfer the right of action of the party injured to his representative, but gives to the representative a totally new right of action on different principles. It is "an action which, as is pointed out in *Pym v. Great Northern Railway Co.* (2), is new in its species, new in its quality, new in its principle . . . and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss by the death"; the words of Lord *Blackburn* in *Seward v. "Vera Cruz"* (3). Referring to what was said by *Bowen L.J.* in the same case (4), *Knox C.J.*, in *Victorian Railways Commissioners v. Speed* (5) said: "The action is in truth an action to recover damages for the injuriously affecting the interests of the dead man's family. It arises partly from the death and partly from a combination of circumstances pecuniary or other with which the person whose alleged wrongful act caused the death has nothing to do".

These passages show that *by itself* the declaration contained in sub-s. (1) of the new s. 25 of the *Administration and Probate Act* that causes of action subsisting against a person dying shall survive against his estate cannot apply to a cause of action under *Lord Campbell's Act* arising after the death of the wrongdoer

(1) (1852) 18 Q.B. 93, at p. 110 [118 E.R. 35, at p. 41].

(2) (1862) 2 B. & S. 759 [121 E.R. 1254]; (1863) 4 B. & S. 396 [122 E.R. 508].

(3) (1884) 10 App. Cas. 59, at p. 70.

(4) (1884) 9 P.D. 96, at p. 101.

(5) (1928) 40 C.L.R. 434, at p. 438.

through the subsequent death of the person wronged. But sub-s. (1) does not stand by itself. Sub-section (6) of the same section provides for cases where the death of a wrongdoer occurs after he has done the wrongful act or made the wrongful omission but before any damage has ensued. It will be seen that where damage is the gist of the action no cause of action would subsist in such a case at the wrongdoer's death to survive against his estate. To make what is meant clear it may be better to give an imaginary example. Suppose a wrongful act consisting in placing an obstruction in a highway and further suppose that before anyone collides with the obstruction the person responsible dies. Then someone lawfully using the highway is injured by the obstruction. His cause of action would not have accrued before the wrongdoer's death and *by itself* sub-s. (1) would not cover the case, for reasons which in their essentials are the same as those which exclude the present case from the operation of sub-s. (1) *by itself*.

Sub-section (6) is as follows :—

“ Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage is suffered there shall be deemed for the purposes of this section to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.”

It will be seen that this provision operates by bringing under sub-s. (1) a case otherwise outside its application and does so by directing that in the condition it defines there shall be deemed for the purposes of the section to have been subsisting against the wrongdoer before his death such cause of action in respect of the act or omission as would have subsisted on the false assumption that he had died after the damage was suffered.

In the case of a right of action under *Lord Campbell's Act* the damages are those “ resulting from such death ” (s. 16 of the *Wrongs Act*). The death must be caused by a wrongful act, neglect or default (s. 15). Now, if the fulfilment of these requirements satisfies the condition expressed in the opening words of sub-s. (6) of the new s. 25 of the *Administration and Probate Act*, there seems to be no reason why sub-s. (6) should not include the case. The condition referred to is that stated by the words “ where damage has been suffered by reason of any act or omission in respect of ” &c. The damages suffered for which *Lord Campbell's Act*

H. C. OF A.
1951.

PARTRIDGE
v.

CHICK.

Dixon J.
Williams J.
Webb J.
Kitto J.

H. C. OF A.

1951.

PARTRIDGE

v.

CHICK.

Dixon J.
Williams J.
Webb J.
Kitto J.

gives a right of action consist in the pecuniary loss which the death brings to relatives: "damages for injuriously affecting the dead man's family" in the language already quoted. There is no difficulty in applying to this loss the words in sub-s. (6) "Where damage has been suffered". But then follow the words "by reason of any act or omission in respect of which a cause of action would have subsisted" &c. Here the "act or omission" is the basis of the cause of action which would be complete when the damage ensues. Under *Lord Campbell's Act* there are three things—the pecuniary loss constituting the damage: the death from which it arises: the wrongful act, neglect or default causing the death. It may be said that under sub-s. (6) only the first and third are covered. But this is a verbal point, an objection which overlooks the generality of the words and the broad principle they express. They apply where the damage is the consequence of the wrongful act or omission in such a sense that given the wrongful act or omission and the damage flowing from it a cause of action exists. In an action under *Lord Campbell's Act* what is required is no other than damage proceeding from the wrongful act, although it is in a specific case involving two steps, namely, a wrongful act or omission causing death and thereby pecuniary loss. It has been said that the basis of the action lies in pecuniary loss actual or expected or in the destruction of a reasonable expectation of pecuniary benefit: *Taff Vale Railway Co. v. Jenkins* (1). Thus at the moment of death of the wronged person his relatives' expectation of pecuniary benefit is destroyed and it is that destruction which at once gives them their cause of action. So viewed there is no reason why the primary requirements of a right of action under *Lord Campbell's Act* should not be held to correspond with the condition expressed at the commencement of sub-s. (6) so that the condition is satisfied. In other respects the language of the sub-section appears aptly to apply to the case of a right of action under *Lord Campbell's Act* where the wrongdoer has predeceased the injured party. That is best shown by interpolating in the sub-section the specific applications of each phrase, thus:—"Where damage (the destruction of the expectation of pecuniary benefit from the deceased's remaining alive) has been suffered (by his relatives) by reason of any act or omission (the wrongful act neglect or default) in respect of which a cause of action (under *Lord Campbell's Act*) would have subsisted against any person (the wrongdoer) if that person (the wrongdoer) had not died before the damage (the destruction by the deceased's death of the expectation of pecuniary benefit)

(1) (1913) A.C. 1, at p. 9.

was suffered (by the relatives) there shall be deemed for the purposes of this section (including sub-s. (1)) to have been subsisting against him (the deceased wrongdoer) before his (the wrongdoer's) death such cause of action (under *Lord Campbell's Act*) in respect of that act or omission (the wrongful act neglect or default) as would have subsisted (in favour of the relatives) if he (the wrongdoer) had died after the damage (the loss of the expectation of pecuniary advantage) was suffered (by the relatives)."

This application of sub-s. (6) is supported by the second part of sub-s. (7) which provides that the section shall apply in relation to causes of action under Part III. of the *Wrongs Act* as it applies in relation to other causes of action not expressly excepted from the operation of sub-s. (1). The provision is applicable to the whole section of which sub-s. (6) is but a part, but it means that whatever in the section is capable of application to rights of action under Part III. shall be applied.

In answer to such an application of sub-s. (6), it was argued that the sub-section was directed to the problem of causes of action of which damage is the gist when the death of the wrongdoer occurs before the damage ensues and that it was but an accident if the language fitted a right of action under *Lord Campbell's Act* where the death of the wrongdoer preceded that of the injured party. But, as has been already pointed out, in essentials they are like cases: they fall under the same description, viz., the death of a wrongdoer intervening before the consequences of his wrongful act ensue. The language of the sub-section is intended to express a principle and such a case is within the principle.

It was further urged for the respondent that the legislature might well have regarded it as unjust to expose a dead man's estate to claims arising from loss of life occurring long after his death: the section covers nearly all torts and it is a mistake to construe it as if it related primarily to road accidents.

The legislature seems, however (subject to express exceptions), to have endeavoured completely to abolish the doctrine by which the death of a party ended liability arising from civil wrongs. It provided in sub-s. (5) a period of limitation for actions which applies to all other cases under sub-s. (1) aided by sub-s. (6), and it is hard to understand why there should be any differentiation in the case of *Lord Campbell's Act*. For the purposes of sub-s. (5) an action under that Act can be taken to be based on a cause of action in tort. See *Hodsmen v. Maxwell* (1) and *Glanville*

H. C. OF A.

1951.

PARTRIDGE

v.

CHICK.

Dixon J.
Williams J.
Webb J.
Kitto J.

H. C. OF A.
1951.

PARTRIDGE
v.
CHICK.

Dixon J.
Williams J.
Webb J.
Kitto J.

Williams (1951), *Joint Torts and Contributory Negligence*, note 25 to s. 115, p. 444. Indeed, if the case of the death of the wrongdoer before the injured party as affecting a right of action under *Lord Campbell's Act* were not covered, it is almost evident that it would be a *casus omissus* and in the construction of a remedial statute such a conclusion is to be avoided if the language of the enactment allows.

The appellant, by way of alternative, contended that the result which the foregoing reasoning reaches upon sub-s. (6) may also be justified by a combination of the language of s. 15 of the *Wrongs Act* with sub-s. (1) of the new s. 25 of the *Administration and Probate Act*. The argument involves an application of s. 15 of the *Wrongs Act* upon the basis that sub-s. (1) of s. 25 of the *Administration and Probate Act* caused the right of action vested in the person wronged (in this case the cyclist) to survive the death of the wrongdoer (the car driver), who predeceases him, against the wrongdoer's estate. That means that sub-s. (1) of s. 25 is resorted to to keep alive the cause of action vested in the injured party notwithstanding the wrongdoer's death, to keep it alive so that it existed at the moment of the injured party's death. So applying sub-s. (1) of s. 25, s. 15 of the *Wrongs Act* is read in a manner which may best be made clear by the use again of interpolations. Interpolated with the specific applications of phrases it would run as follows:—"Whensoever the death of a person (the person wronged, the cyclist) is caused by a wrongful act neglect or default (the negligent driving of the motor car) and the act neglect or default is such (i.e. is tortious) as would, if death (of the person wronged, the cyclist) had not ensued, have entitled the party injured (the cyclist) to maintain an action and recover damages (as it would at the time of his death have entitled him to maintain an action against the wrongdoer's legal personal representative or 'estate') in respect thereof (i.e. of the act neglect or default), then and in every such case, the person who would have been liable (i.e. the legal personal representative of the wrongdoer) if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured."

A substantial objection to this mode of applying s. 15 to the situation produced by sub-s. (1) of the new s. 25 of the *Administration and Probate Act* is that, while it invokes sub-s. (1) to continue the cause of action against the estate of the wrongdoer who predeceased the person wronged so as to apply to the wrongdoer's legal personal representatives the expression "the person who would have been liable", yet it ignores sub-s. (1) in its application

to the person wronged, for the benefit of whose estate the cause of action would have survived, when he in turn died. The words "would have been liable if death had not ensued" contemplate a cause of action lapsing with the death of the party in whom it is vested. But sub-s. (1) makes it impossible that this should now occur. It was because a cause of action for a civil wrong did lapse on death that the statute was enacted, and there is much to be said for the view that the words quoted imply that the cause of action must have been such that it would not have survived the death of the injured person, though it must be conceded that the application of the provision to causes of action *ex contractu* tends against such a view: cf. *Woolworths Ltd. v. Crotty* (1).

The possibility of this being the true meaning of the words shows how necessary it was to include the provision contained in sub-s. (7) of s. 25. For without that provision the words might no longer have applied when, by virtue of sub-s. (1), the cause of action in the person wronged survived his death for the benefit of his estate. Sub-section (7) prevents the application of sub-s. (1) so as to derogate from rights otherwise conferred by Part III. of the *Wrongs Act*, but it is difficult to use that as a justification for employing sub-s. (1) to bring about the fulfilment of a requirement of s. 15 and at the same time ignoring it in the case of an hypothesis which its application would render false.

The appellant's alternative argument is open to yet another objection, which may be thought to arise from, or at all events be supported by, the same consideration, namely, the consideration that necessarily underlying s. 15 is the assumption that the death of either party, the death of the wrongdoer alike with that of the person wronged, put an end to the cause of action upon the hypothetical existence of which in the man dying the enactment is based. For on that assumption it is clear that the expression "the person who would have been liable" must be understood as referring to the wrongdoer, including, of course, under that description not only the person actually guilty of the wrongful act or omission but also any person vicariously responsible for the wrong. Indeed, it may be thought that the natural meaning of the phrase "the person who would have been liable" is "the person who would have been liable to such an action and to have damages recovered from him personally by the injured party". If so it is hardly apt to include a liability to be sued in a representative capacity in an action in which the judgment would be for the recovery of damages out of the assets of a testator or intestate.

H. C. OF A.
1951.

PARTRIDGE
v.
CHICK.

Dixon J.
Williams J.
Webb J.
Kitto J.

H. C. OF A.

1951.

PARTRIDGE

v.

CHICK.

Dixon J.
Williams J.
Webb J.
Kitto J.

It is, however, unnecessary to consider further the possible operation of s. 15 to bring about the result that the action is maintainable in view of the conclusion that sub-s. (6) does so.

The appeal should be allowed with costs. The order of the Supreme Court should be discharged and in lieu thereof it should be ordered that the point of law arising upon pars. 7 and 10 of the defence in relation to the allegations contained in the statement of claim be determined by a declaration that the death of Leslie Frederick Chick before the death of George Frederick Partridge affords the defendant as administrator of Leslie Frederick Chick's estate no answer to the plaintiff's claim in the action under Part III. of the *Wrongs Act*. It should be further ordered that the plaintiff's taxed costs of the summonses dated 14th December 1950 and 13th June 1951 and of the proceedings therein be paid by the defendant. There should be a certificate that so far as such proceedings were in chambers they were proper for the attendance of counsel.

FULLAGAR J. In this case the plaintiff, as administratrix of the estate of George Frederick Partridge deceased, sued the defendant as administrator of the estate of Leslie Frederick Chick deceased, alleging a cause of action under s. 15 of the *Wrongs Act* 1928 (Vict.). The statement of claim alleged that on 13th October 1949 a motor car driven by Chick collided with a bicycle driven by Partridge, that the collision was due to the negligence of Chick, and that both Partridge and Chick died on the following day from injuries received in the collision. The defence alleged that Chick died a short time before Partridge and raised a contention that the action could not therefore be maintained. On summonses in chambers *Lowe* A.C.J. decided that this contention was sound in law, and, the matter being thereupon referred into court, judgment in the action was pronounced for the defendant. From that judgment the plaintiff appeals.

Two arguments on behalf of the plaintiff were submitted to the learned judge of the Supreme Court, and two were presented before this Court. The first depends on what is said to be the combined effect of s. 15 of the *Wrongs Act* 1928 and the new sub-s. (1) introduced into s. 25 of the *Administration and Probate Act* 1928 (Vict.) by s. 2 of the *Survival of Actions Act* 1942 (Vict.). The second is based on the new sub-s. (6) of s. 25 which is introduced by the same section of the Act of 1942.

I agree with *Lowe* A.C.J. that the first argument fails. Section 15 of the *Wrongs Act* gives the "new" statutory cause of action where "the death of a person is caused by a 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". It must be assumed, for present purposes, that Chick was guilty of a wrongful act neglect or default which would, if Partridge's death had not ensued, have entitled Partridge to maintain an action against Chick. Section 15 proceeds: "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". But, before any action under s. 15 was, or could be, commenced against Chick, Chick died. Section 15 gives an action only against the alleged wrongdoer himself. If he dies before action brought, no action lies. If he dies after action brought but before judgment, the action is abated according to the rule of the common law. If, therefore, s. 15 stood alone, it is clear that the plaintiff could not maintain her action in respect of the death of Partridge: it would not matter whether Partridge died before Chick or Chick before Partridge. The plaintiff turns accordingly to the *Survival of Actions Act*. But the new sub-s. (1), which that Act introduces into the *Administration and Probate Act* 1928, merely says (so far as material) that "on the death of any person . . . all causes of action subsisting against or vested in him shall survive against or (as the case may be) for the benefit of his estate". For the purposes of this sub-section the order in which the deaths occurred becomes of vital importance. For, if the death of the alleged victim (Partridge) occurred before the death of the alleged wrongdoer (Chick), a cause of action under the *Wrongs Act* subsisted against Chick at his death, and the effect of sub-s. (1) will be that that cause of action will survive against his estate. But in fact Chick died before Partridge. At Chick's death, therefore, no cause of action under the *Wrongs Act* subsisted against him, and sub-s. (1), if it stood by itself, would have no application to the case. Cf. *Kebby v. Waldron* (1). The plaintiff's first argument thus fails.

It was said that the words "the person who would have been liable" in s. 15 of the *Wrongs Act* must now be read as including the executor or administrator of the person guilty of the wrongful act neglect or default, because the effect of the new s. 25 (1) of the *Administration and Probate Act* is to make the executor or administrator of that person liable to an action for damages in cases where the person injured does not die. This is a fairly arguable view, but it does not seem to me to represent a legitimate reading of s. 15. The expression "the person who

H. C. OF A.
1951.

PARTRIDGE

v.

CHICK.

Fullagar J.

H. C. OF A.
1951.

PARTRIDGE

v.
CHICK.

Fullagar J.

would have been liable " doubtless includes persons other than the person immediately guilty of the wrongful act neglect or default. It would cover the master of a servant and the principal of an agent. But it contemplates, in my opinion, only persons who are personally liable for the act neglect or default. It cannot, I think, be fairly read as including an " estate " against which a cause of action survives by virtue of s. 25 (1), or a person or persons who would merely represent an estate for the purposes of that sub-section. Cf. *Seward v. " Vera Cruz "* (1) (per Lord Selborne L.C.).

I am of opinion, however, that Mr. *Eggleston's* second argument is sound, and that the new sub-s. (6) enables the plaintiff to maintain her action, and, if she can prove her facts, to recover damages. The statute under consideration in *Kebby v. Waldron* (2) contained no such provision as sub-s. (6). That sub-section provides that " where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage is suffered there shall be deemed for the purposes of this section to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered."

I am of opinion that the plaintiff in the present case " suffered damage " within the meaning of sub-s. (6) when the death of Partridge occurred. It is, of course, true to say that, before damages can be recovered under the *Wrongs Act*, actual pecuniary loss consequential on the death must be proved. But it is also, I think, true to say that the elements of the cause of action given by the *Wrongs Act* are (1) an *injuria* consisting of a " wrongful act neglect or default " having the character described in s. 15, and (2) a *damnum* which is constituted by the death of the " victim ". As Lord Selborne said in *Seward v. " Vera Cruz "* (1), " death is essentially the cause of the action ". The death may or may not amount to a *damnum*. It is easy to imagine cases where the death of a husband or father involves no loss to his widow or children. It may indeed involve nothing but clear gain to them. And in such cases no action under the *Wrongs Act* can succeed. But these considerations do not alter the fact that the cause of action, if there is a cause of action, is complete at the moment when death takes place, and damages must be assessed as at that moment. Given the *injuria*, the death supplies the *damnum*, and the rest is merely matter of quantification of the *damnum*.

(1) (1884) 10 App. Cas. 59, at p. 67.

(2) (1943) 43 S.R. (N.S.W.) 342; 60 W.N. 218.

If the view which I have expressed be correct, as I think it is, the present case is seen to fit within sub-s. (6) on the assumptions which must, of course, be made for the purposes of this appeal. Damage has been suffered by the plaintiff. That damage is constituted by the death of Partridge. It has been suffered by reason of an act or omission of Chick. In respect of that act or omission a cause of action under the *Wrongs Act* would have subsisted in the plaintiff against Chick if Chick had not died before the plaintiff suffered her damage in the death of Partridge. The consequences provided by sub-s. (6) then follow. There must be deemed for the purposes of s. 25 of the *Administration and Probate Act* (including sub-s. (1) of that section) to have been subsisting against Chick before his death any cause of action which would have subsisted against him if he had died after Partridge's death. A cause of action under the *Wrongs Act* would have subsisted in the plaintiff at Chick's death if Chick had died after Partridge. That cause of action must be deemed to have been subsisting against Chick before his death. And, by virtue of sub-s. (1), that cause of action survives against Chick's estate.

The difference between the view which I take and the view taken by *Lowe A.C.J.* rests, I think, in the last analysis, not on any difference of opinion as to the scope of the word "damage" but on a difference as to the meaning to be given to the word "subsist". I treat it, in effect, as meaning simply "exist". His Honour, I think, treats it as meaning, in effect, "continue to exist", and he accordingly regards the words in sub-s. (6) "in respect of which a cause of action would have subsisted" as covering only cases in which a cause of action did exist before the death of the person in question and was only prevented from continuing to exist by his death. On this view, since no cause of action under the *Wrongs Act* did exist against Chick before his death, the case is not covered by sub-s. (6).

The *Oxford Dictionary* gives (*inter alia*) the following meanings of the word "subsist":—(1) To have an existence as a reality, to exist as a substance or entity. . . . (4) To preserve its existence or continue to exist". *Webster* gives us:—"(1) to continue, remain, abide, to retain the present state: (2) To have existence, to be, to exist or continue to exist". The dictionaries do not seem to carry us very far. My own feeling is that the view of *Lowe A.C.J.* probably interprets the word, regarded simply in isolation as an English word, more accurately than does my own view. But to regard it as meaning simply "exist" is very far indeed from giving to it an unnatural or unlikely meaning. And there are, I think, extremely strong reasons for so regarding it

H. C. OF A.

1951.

PARTRIDGE

v.

CHICK.

Fullagar J.

H. C. OF A.
1951.

PARTRIDGE

v.

CHICK.

Fullagar J.

in its context here. In sub-s. (1) the word “subsisting” is clearly used without any implication of continuance: indeed it is used on the assumption that, but for sub-s. (1) itself, a cause of action would not continue to exist. And the whole scope and purpose of s. 2 of the *Survival of Actions Act* tends to support, I think, the wider view of the word. It would be a strange result, having regard to the clear policy embodied in sub-s. (1), if the right of action under the *Wrongs Act* depended, in such a case as the present, on whether the wrongdoer died before the victim or the victim before the wrongdoer. I think, too, that my view of sub-s. (6) generally is strongly supported by the latter part of the new sub-s. (7), which provides that s. 25, as amended, shall apply to causes of action under the *Wrongs Act* as it applies to other causes of action not expressly excepted. Finally, I have not been able to think of any purpose which can be effected by sub-s. (6) or of any effect that can be given to it if it does not apply to such a case as the present. I think its purpose was to fill in the gap left by sub-s. (1), and I think it achieves its purpose and applies to this case.

In my opinion, this appeal should be allowed. I agree with the order proposed by my brothers.

Appeal allowed with costs. Discharge so much of the order of the Supreme Court as dismisses the two summonses dated respectively 14th December 1950 and 13th June 1951 and orders that judgment be entered for the defendant with costs. In lieu thereof substitute an order that the point of law arising upon pars. 7 and 10 of the defence in relation to the allegations contained in the statement of claim be determined by a declaration that the death of Leslie Frederick Chick before the death of George Frederick Partridge affords the defendant as administrator of the estate of Leslie Frederick Chick no answer to the plaintiff's claim in the action under Part III. of the Wrongs Act 1928 as amended. Further order that the plaintiff's costs of the said summonses and of the proceedings thereon be taxed and paid by the defendant to the plaintiff.

Certify that so far as such proceedings were in chambers they were proper for the attendance of counsel.

Solicitors for the appellant, *Gillott, Moir & Ahern.*
Solicitors for the respondent, *Blake & Riggall.*

E. F. H.