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Morley v. Post, 84 Colo. 41. Judgment for defendant reversed.
 Glasson v. Bowen, 84 Colo. 57. Judgment for defendant affirmed.
 Radovich v. Douglas, 84 Colo. 149. Judgment for plaintiff affirmed.
 Towles v. Meador, 84 Colo. 547. Judgment for defendant reversed.
 Walker v. Hunter, 86 Colo. 483. Judgment for defendant reversed.
 Leighton v. People, 90 Colo. 106. Conviction of criminal libel affirmed.
 Bearman v. People, 91 Colo. 486. Conviction of criminal libel affirmed.
 Bereman v. Power Publishing Co., 93 Colo. 581. Judgment for defendant affirmed.
 Kendall v. Lively, 94 Colo. 483. Slander judgment for plaintiff for \$475 affirmed.
 Biggerstaff v. Zimmerman, 108 Colo. 194. Slander judgment for defendant reversed.
 Knapp v. Post Publishing Co., 111 Colo. 492. Judgment for defendant affirmed.
 Lininger v. Knight, decided Jan. 15, 1951, 1950-51 CBA Advance Sheet 186 (No. 9 for Jan. 20). Judgment for plaintiff reversed.

Summary

CIVIL LIBELS:	Judgment against defendant reversed—14
Judgment for plaintiff affirmed—7	CRIMINAL LIBELS:
Judgment against plaintiff reversed—10	Judgment affirmed—1
Judgment for defendant affirmed—7	Judgment reversed—1

DOUBLE RECOVERY FOR WRONGFUL DEATH BY PUBLIC CARRIER?

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If John Doe departs this life through the negligence of a servant of a public carrier, while that servant is running a locomotive, must Mary Doe, his wife, elect whether to sue under Section one (the penal section) of the Colorado wrongful death statute¹ or under Sections two and three (the compensatory sections) of that statute, or can she recover damages under each section? The general question, it seems, is this: If the factual situation in a wrong-

¹ COLO. STAT. ANN., c. 50, §§ 1-4 (1935). The pertinent provisions of the statute are as follows:

Section one: Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars, or of the driver of any coach or other public conveyance whilst in charge of the same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage coach or other public conveyance at the time any such injury is received, and resulting from or occasioned by defect or insufficiency above described, shall forfeit and pay for every person and passenger so injured the sum not exceeding five thousand dollars, and not less than three thousand dollars, which may be sued for and recovered: . . . [Following are designated the persons who have a cause of action under the statute.]

Section two: Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, 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 party injured.

Section three: All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 1 of this chapter, and in every such action the jury may give such damages as they deem fair and just, not exceeding five thousand (5,000) dollars, with reference to the necessary injury resulting from such death, to the surviving parties, who may be entitled to sue; and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect or default.

ful death action is such that it comes within the purview of each section of the statute, does the plaintiff have but one cause of action, or does he have two?

In the case of *Dood v. Baker*,² Judge Gooding, sitting in the District Court for the County of Routt, decided that the plaintiff has two causes of action. On defendant's motion "to dismiss, to elect, and to sever" the court said:

The question is whether the right of action and remedies under Section 1 and under Sections 2 and 3, respectively, are exclusive and in the alternative or are concurrent and cumulative, when the facts bring plaintiff under both parts.

Judge Gooding held the sections are concurrent and cumulative because: (1) "remedies are cumulative on the face of the law"; and (2) "Where the pleaded facts bring the plaintiff within both parts, the sections are distinguishable only as to the remedies and recoveries." Section one imposes a penalty and Sections two and three provide "something entirely different, compensatory damages."

In *Clasen v. Santa Fe Trails Transportation Company*³ Federal District Judge William L. Knous required the plaintiff to elect the section under which to proceed, stating that if she obtained judgment thereunder, she could then raise the question as to whether she has a cause of action under the other section also, and if judgment is in favor of the defendant on the elected section, then is the time for the court to decide if the entered judgment is *res judicata*. The action was settled, however, before trial on the elected section.

"NEW CAUSE OF ACTION" THEORY IN COLORADO

Certain decisions by the Supreme Court of Colorado on our wrongful death statutes are helpful in attempting to answer the question. For example, that court has pointed out that since there was no right of action for damages resulting from wrongful death at common law, the right exists only by virtue of statute,⁴ which, by the general rule, must be strictly construed.⁵ And, on the wrongful death statutes, Colorado has followed the "new cause of action" theory.⁶

Perhaps most important of the interpretations, for our purposes, is the consistent holding that Sections two and three are compensatory, not penal,⁷ and, conversely, that Section one is

² Civil Action No. 2725, decided October 18, 1949.

³ Unreported case No. 2949 in the United States District Court for the District of Colorado (1950).

⁴ *Hindry v. Holt*, 24 Colo. 464, 51 P. 1002 (1897).

⁵ *Stowell v. People*, 104 Colo. 255, 90 P. 2d 520 (1939).

⁶ *Fish v. Liley*, 120 Colo. 156, 208 P. 2d 930 (1949) (compensatory section); *Denver & Rio Grande R. Co. v. Frederick*, 57 Colo. 90, 213 P. 463 (1914) (penal section).

⁷ *Moffat v. Tenney*, 17 Colo. 189, 30 P. 348 (1892); *Hayes v. Williams*, 17 Colo. 465, 30 P. 352 (1892); *Denver & Rio Grande R. Co. v. Spencer*, 25 Colo. 9, 52 P. 211 (1898).

penal, not compensatory.⁸ In speaking of the compensatory section, the court has said that it affords compensation only for the pecuniary loss which results to the living party entitled to sue from the death of the deceased.⁹ But in speaking of the other section, it has been said that the amount of damages to be assessed thereunder depends "solely upon the degree of culpability of the wrongdoer" and "the fact that recovery may be had under it without any proof whatever of damages conclusively establishes that it is penal."¹⁰

In the leading case of *Denver & Rio Grande R. Co. v. Frederick*,¹¹ the court explained the distinction between the sections in substantially the following language: They are essentially and diametrically different in their characters, purposes, and objects. Section one gives a cause of action whether decedent would have had one or not. Section three gives a cause of action only when the person injured would have had such a right had death not ensued. The purpose of Section one is to guard and protect human life against the fatal consequences of the negligence, unskillfulness, or criminal intent of any officer or servant of any common carrier under the circumstances detailed in the statute. The recovery is denominated a forfeiture, and the fact that it goes to the next of kin cannot be said to affect or change the character of the provision. Because Section one is penal, it was held in the *Frederick* case to be erroneous to allow the plaintiffs to prove damages occasioned by the loss of the services and support of their son, since the amount of recovery depends solely on the degree of culpability of the defendant.

In *A. T. & S. F. R. R. Co. v. Farrow*,¹² the court further explained the difference between these sections:

. . . the legislature discriminates between common carriers and other corporations and individuals. They confine section 1 to the former, while section 2 includes the latter. They desired to impose a different liability upon common carriers from that resting upon all other persons, and chose this way of doing it.

SUIT MAY BE BROUGHT UNDER EITHER SECTION

In *Fredricks v. Denver Tramway Corp.*,¹³ plaintiff was introducing her evidence when the defendant moved she be required to proceed under Section one, "conceded to be penal," or Section two, "conceded to be compensatory." She elected to proceed under Section two, and the action was then dismissed as to the defendants. The dismissal was reversed, the Supreme Court's holding that a common carrier may be sued under "either" section. This,

⁸ *Denver & Rio Grande R. Co. v. Frederick*, *supra*, note 6.

⁹ *Denver & Rio Grande R. Co. v. Spencer*, *supra*, note 7.

¹⁰ *Denver & Rio Grande R. Co. v. Frederick*, *supra*, note 6.

¹¹ *Ibid.*

¹² 6 Colo. 498 (1883).

¹³ 93 Colo. 539, 27 P. 2d 497 (1933).

it seems, is the closest the Supreme Court of Colorado has come to deciding the point in issue.

The New Mexico court has held there is but one cause of action in the situation in question, and that state's wrongful death provisions are substantially the same as those of Colorado. The statute pertaining to the liability of carriers has been construed to be penal,¹⁴ and it has been held, further, that when one is killed by a common carrier, the wrongful death action is under the penal section only, and there cannot be two sections.¹⁵ The United States Court of Appeals for the Tenth Circuit, in an opinion written by Judge Orié L Phillips, relied on the latter decision in again deciding that the action, in the given situation, is under the penal section only.¹⁶ It should be noted that these decisions are contrary to those of the Colorado court.¹⁷

The interpretation of the Missouri statutes, again in substance the same as those of Colorado, is that the one section is penal¹⁸ and the other compensatory.¹⁹ In a decision involving the latter section,²⁰ it was held that the plaintiff could elect the section under which he desires to sue, when the facts fall within both of them, the same construction as our court applied in *Fredricks v. Denver Tramway Corp.*²¹ The Missouri court has also held that the plaintiff must pray for the damages allowed by the compensatory section, and a prayer for damages based on the penal section is error,²² an interpretation similar to that in *Denver & Rio Grande R. Co. v. Frederick.*²³

The Missouri court has decided the point in issue, saying,

there was but one cause of action, and the court was correct in telling the jury, if they found for the plaintiff on one count, to find for the defendant on the other, as it would not have been proper for the jury to have found for the plaintiff on both counts and assess damages accordingly.²⁴

The reasoning behind this conclusion is explained as follows:

To constitute a cause of action, there must be two subjects of complaint. But in the present case there is but one injury, one subject-matter of complaint—the killing of plaintiff's husband. There being but one cause of action, there could not be a verdict for causing the death one way, and another verdict for causing the death in a different way.²⁵

¹⁴ Dale v. Atchinson, T. & S. F. R. Co., 57 Kan. 601, 47 P. 521 (1897).

¹⁵ Romero v. Atchinson, T. & S. F. R. Co., 11 N.M. 679, 72 P. 37 (1903).

¹⁶ Mallory v. Pioneer Southwestern Stages, 54 F. 2d 559 (1931).

¹⁷ See note 13, *supra*.

¹⁸ Young v. St. Louis I. M. & S. Ry. Co., 227 Mo. 307, 127 S.W. 19 (1910).

¹⁹ Cooper v. Kansas City Public Service Co., 356 Mo. 482, 202 S.W. 2d 42 (1947).

²⁰ *Ibid.*

²¹ *Supra*, note 13.

²² Casey v. St. Louis Transit Co., 205 Mo. 721, 103 S.W. 1146 (1907); King v. St. Louis & S. F. R. R. Co., 130 Mo. App. 368, 109 S.W. 859 (1908).

²³ *Supra*, note 6.

²⁴ Peters v. St. Louis & S. F. R. Co., 150 Mo. App. 721, 131 S.W. 917, 923 (1910).

²⁵ Brownell v. The Pacific R. R. Co., 47 Mo. 239, 243 (1879).

ONLY ONE CAUSE OF ACTION DESPITE STATUTE?

Although the Missouri decisions would seem to be conclusive on the question, it might be well to recall that the Colorado statute does appear, on its face, to create two cases of action, and that some of the language in the Colorado court's opinion in *Denver & Rio Grande R. Co. v. Frederick* lends itself to such a construction. I am inclined to conclude, however, that there is but one cause of action in our hypothetical case.

Some general statements of law have been persuasive in reaching this conclusion. For instance, in an action brought under the Colorado statute for the death of a railroad employee while engaged in interstate commerce, wherein the Supreme Court of Colorado held the action should have been brought under the appropriate federal statute, the court said, "The two statutes cover the same subject, are unlike in substantial respects, and cannot occupy the same field."²⁶ A statement by the Missouri court which may explain this result is as follows:²⁷

Where there are two statutes and the provisions of one apply specially to a particular subject, which clearly includes the matter in question, and the other general in its terms, and such that, if standing alone, it would include the same matter, and thus conflict with each other, then the former act must be taken as constituting an exception, if not a repeal of the latter or general statute.

Similarly, a federal court has said,²⁸

Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general.

At this writing, two bills have been passed in the Colorado Legislature, Senate Bill No. 49 and House Bill No. 78. Each of these increases the maximum allowable under each section of the statute to \$10,000. There is no other change in substance, except that the Senate Bill deletes the words "and not less than three thousand dollars" in the present statute, and adds the words, "deemed just and fair by a jury or court." If this wording should be construed to make the proposed act compensatory rather than penal, then the solution to our problem should be much simpler than it is under the present statutes. However, such a construction is unlikely, since, in *Denver & Rio Grande R. Co. v. Frederick*, the court listed at least three other reasons why it felt the statute is penal rather than compensatory, and there is also the fact that the proposed statute continues to use the word "forfeit". It seems, then, the enactment of either of the proposed statutes should have no effect on Mary Doe's problem, should it arise before the Supreme Court of Colorado, and she should be held to have only one cause of action for John Doe's wrongful death.

²⁶ *Denver & Rio Grande R. Co. v. Wilson*, 62 Colo. 492, 494, 163 P. 857, 859 (1917).

²⁷ *Gilkerson v. Missouri Pac. Ry. Co.*, 22 Mo. 173, 121 S.W. 138, 148 (1909).

²⁸ *U. S. v. Mammoth Oil Co.*, 14 F. 2d 705, 715 (1926).