

## Torts: Liability for Wrongful Death

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proceedings. See *John Hancock Mutual Life Ins. Co. v. Meester*, 173 Minn. 18, 216 N.W. 329, 330 (1927); *Stamp v. Eclehardt*, 204 Iowa 541, 215 N.W. 609, 611 (1927). The mortgagee should petition for a receiver before attempting to collect the rent pledged. *Kooistra v. Gibford*, 201 Iowa 275, 207 N.W. 399 (1926). The Wisconsin court has said that a pledge of rents and profit could be enforced only by the interposition of the equity court and the appointment of a receiver. *Grether v. Nick*, *supra*.

In the instant case the court ruled that the parties intended the mortgagor to surrender all possessory rights upon a default in the mortgage payments, possession then vesting in the mortgagee. This is perhaps adequate as a description of the status of the parties but it is doubtful whether they really understood at the time that such a change in possession was taking place. The fact that the landlord-owner subsequently negotiated with the tenant as to the rent seems to indicate she did not consider that the possession had changed. She did, however, file an affidavit in support of the plaintiff's motion for a summary judgment in the action, which affidavit recited that the mortgagee was entitled to the rents according to the terms of the assignment. Thus the court advances the theory that the parties did intend that there should be an automatic entry or change in possession upon default, that the assignment carried out this intention and the affidavit was corroboration thereof. The mortgagee, in possession at the moment a default occurred was entitled to the rent. The decision reveals a unique method by which the mortgagee of leased premises may become the landlord with all the legal remedies incident to such a status, and this without appealing to the equity court to accomplish dispossession in the traditional manner.

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TORTS—LIABILITY FOR WRONGFUL DEATH.—Action brought by administrator of deceased victim, against the administrator of deceased tortfeasor. The plaintiff's intestate was injured in a collision between his automobile and one driven by the defendant's intestate. The defendant was dead upon entrance at the hospital; while the plaintiff died a few hours later. By a special verdict the defendant was found 85 per cent negligent and the plaintiff 15 per cent negligent. *Held*, No cause of action for wrongful death had arisen during the tortfeasor's life, and the statute relating to survival of actions operates only on causes of action which have come into being during the life of the wrongdoer. *Hegel v. George, et al.*, (Wis. 1935) 259 N.W. 862.

At common law no action would lie to recover damages for the wrongful death of a human being unless a statute so provided. *Baker v. Bolton*, 1 Campbell 493, 170 Eng. Rep. 1033 (1808). The wrongful causing of death was held to be a felony and no civil action could be based on it, as the civil wrong was considered to have merged with the felony and redress, if any, could be had only by a criminal prosecution. *Higgins v. Butcher*, Yel. 89, 80 Eng. Rep. 61 (1607). The right of action for a tortious wrong is personal and is destroyed by the death of either the wronged party or the wrongdoer. *Finley v. Chirney*, 20 Q.B.D. 494 (1888). There are few decisions contrary to the common law rule that without statute no action for wrongful death will lie. *Cross v. Guthery*, 2 Root (Conn.) 90, 1 Am. Dec. 61 (1794); *Plummer v. Webb*, 19 Fed. Cas. 894 (1825); *Ford v. Monroe*, 20 Wend. (N. Y.) 210 (1838). The right to recover for wrongful death has been incorporated into the Wisconsin statutes. WIS. STAT. (1933) §331.03. A distinction should be noted between the "wrongful death"

statute and the "survival statute;" one creates a new cause of action, the other permits a cause of action to be maintained after the death of one of the parties. WIS. STATS. (1933) §§331.01, 331.03. Prior to 1933 it was established in Wisconsin that a cause of action for wrongful death did not survive the death of the wrongdoer. *Krantz v. Wis. Trust Co.*, 155 Wis. 40, 143 N.W. 1049, Ann. Cas. 1915 C 1050 (1913); *Layton v. Rowland*, 197 Wis. 535, 222 N.W. 811 (1929); *Weichman v. Huber*, 211 Wis. 333, 248 N.W. 112 (1933). This was changed by statute in Wisconsin; such actions should survive the death of either party. Wis. Laws (1933) c.53.

A statute must expressly provide for the survival in event of the wrongdoer's death in order to accomplish that purpose. *Davis v. Nichols*, 54 Ark. 358, 15 S.W. 880 (1891); *Green v. Thompson*, 26 Minn. 500, 5 N.W. 376 (1880). The "death" statute creates a new action which never accrued to the decedent, and not having existed until that time it cannot be said to survive unless there is a specific provision therefor. See *Evans* (1933) 1 Chi. L. Rev. 102. When the wrongdoer dies before the injured victim, there is no cause of action against the personal representatives of the former by those of the latter, as the wrongdoer's prior death prevented a cause of action coming into existence. *Beavers v. Putnam's Adm.*, 110 Va. 713, 67 S.E. 353 (1910). Survival statutes save causes of action that have already arisen, but do not create a cause of action in favor of an injured person where the wrongdoer dies before or at the moment that the cause of action arises. *Krantz v. Krantz*, 211 Wis. 249, 248 N.W. 155 (1933).

It is suggested, therefore, that actions for wrongful death should by specific provision of statute survive the death of the wrongdoer and that the wrongful act which may ultimately cause the death of a person should be made actionable against the wrongdoer's personal representative even though he may have died before his victim.

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