

suffering, loss of time and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received."

It is settled by the decisions of the supreme court of Tennessee that no action can be maintained by an administrator of a deceased person under the foregoing sections unless there shall be in existence persons for whose benefit the right of action is given, and that a declaration drawn under these sections, which does not set forth the person for whose benefit the suit is brought, is fatally defective. *Railway Co. v. Lilly*, 90 Tenn. 563, 18 S. W. 243; *Railroad Co. v. Pitt*, 91 Tenn. 86, 18 S. W. 118. The next of kin for whose benefit the suit is brought are the real plaintiffs, and the administrator, though dominus litis, and a necessary party in all cases where there is no widow or child of the deceased, is, nevertheless, but a nominal party, and a mere trustee. *Webb v. Railway Co.*, 88 Tenn. 128, 12 S. W. 428; *Loague v. Railroad Co.*, 91 Tenn. 458, 19 S. W. 430; *Railroad Co. v. Bean*, 94 Tenn. 388, 29 S. W. 370. Under section 3134, the recovery is not only for the mental and physical suffering of the deceased, his loss of time, and necessary expenses incident to the injury, but it is also for the direct pecuniary injury to the beneficiary on whose behalf the suit is brought, caused by the death complained of. The cause of action may, therefore, vary materially in the extent of the recovery, as it is brought for one or another beneficiary. The administrator, except where there is a widow or child, must bring the suit; but his suit for one beneficiary is a different suit from a suit by him for another. To change the beneficiary, under the statute, changes the suit, the amount of recovery, and states a new and different cause of action. In the light of this conclusion, the plea of the statute was good against the amendment herein when filed, and should have been sustained.

The judgment of the circuit court is reversed, with directions to set aside the verdict, to sustain the plea of the statute of limitations to the declaration as amended, and to enter judgment for defendant.

CONTINENTAL CONST. CO. v. CITY OF ALTOONA.

(Circuit Court of Appeals, Third Circuit. January 25, 1899.)

No. 47, September Term.

1. MUNICIPAL CORPORATIONS—CONTRACTS—AUTHORITY TO MAKE.

The board of commissioners of the water department of cities of the third class having no power, under Act Pa. May 23, 1889, to enter into a contract for the construction of a water reservoir without previous consent of the city councils, such power is not conferred by an ordinance authorizing the issue of water bonds, and resolutions authorizing the commissioners to have plans prepared for the reservoir, and to advertise for bids therefor.

2. SAME—CONTROLLER'S CERTIFICATE.

The requirement of Act Pa. May 23, 1889, art. 9, § 5, that no contract by a city of the third class, requiring the appropriation of money, shall

take effect until the controller shall certify thereon that the estimated cost of the work has been charged against the proper item of appropriation, cannot be dispensed with by the councils or electors.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action by the Continental Construction Company against the city of Altoona for damages for breach of a contract between plaintiff and the city, by its board of commissioners of the water department, for the construction of an impounding reservoir. There was a compulsory nonsuit at the close of the plaintiff's case. A motion to strike it off was denied, and plaintiff brings error. Affirmed.

The following is the opinion of the court below (ACHESON, Circuit Judge):

Under the provisions of the act of Pennsylvania of May 23, 1889, for the incorporation and government of cities of the third class, the power to enter into such a contract as the one declared on is not vested in the board of commissioners of the water department, without the previous consent and direction of city councils. There is, I think, no evidence of the previous consent of councils to the contract here in question, or of any subsequent ratification of it. Neither the ordinance of April 14, 1891, for an election to authorize an increase of the city debt and for the issue of water bonds, the resolution of August 1, 1892, for the preparation of plans and specifications for the contemplated work, nor the ordinance of October 17, 1892, directing the water commissioners to advertise for bids, conferred authority upon the board of water commissioners to enter into a contract for the construction of an impounding reservoir. Nor did all these ordinances, taken together, confer such authority on that board. To advertise for bids is one thing, but to bind the city by the acceptance of one of several bids is quite a different thing. I am of opinion that the city of Altoona was not bound by the contract which the water commissioners undertook to enter into with the plaintiff, for lack of legal authority in the commissioners to make such contract.

Moreover, there is an entire want of any certificate by the city controller, as prescribed by the act of May 23, 1889, and declared by the supreme court of Pennsylvania, in the case of *City of Erie v. Moody*, 176 Pa. St. 478, 35 Atl. 136, to be essential to the validity of such a contract as that here in question. I do not see that such a certificate was dispensed with by anything that was done by the councils or the electors of the city. Indeed, the prescribed certificate by the controller could not thus be dispensed with.

The plaintiff company did no work whatever under the alleged contract. This suit is wholly for the recovery of damages for a breach by the city of the alleged contract set up by the plaintiff. The complaint is that the city councils would not permit the plaintiff to do the work, but repudiated the contract that the water commissioners had undertaken to enter into. I am of opinion that the plaintiff has failed to show any right of action, and the defendant's motion for a nonsuit must be allowed.

L. Laffin Kellogg, for plaintiff in error.

Geo. B. Bowers and Wm. M. Hall, Jr., for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

DALLAS, Circuit Judge. This was an action in the circuit court for the Western district of Pennsylvania to recover for the breach of a contract alleged to have been made by the defendant in error. The court below entered a judgment of compulsory nonsuit, which it subsequently refused to strike off, and thereupon this writ of error was sued out. We are all of opinion that the action of the court

below was right. The contract alleged never had any legal existence, and this is so clearly demonstrated by the opinion of the learned judge that further discussion of the subject would be superfluous. The judgment is affirmed.

EDMUNSON v. PULLMAN PALACE-CAR CO.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1899.)

No. 782.

SLEEPING-CAR COMPANIES—DUTY TO PASSENGERS—NEGLIGENCE.

A ventilating window at the top of a sleeping car was left open at night, in midsummer, and rain drove in upon the occupant of an upper berth, in consequence of which, as he claimed, he contracted a cold, and was made ill. It appeared that such windows were usually left open at that season, but were always opened or closed as requested by the person occupying the upper berth, and could be opened or closed by such person. The occupant in the case in question was an experienced traveler. He made no request that the window be closed, and there was nothing to give notice to the servants of the sleeping-car company that he required special care or attention. *Held*, that such facts did not establish negligence on the part of the company which rendered it liable for his illness, conceding it to have been due to the cause claimed by him.¹

In Error to the Circuit Court of the United States for the Western District of Texas.

James N. Edmunson filed his suit in the district court of El Paso county, Tex., against the Pullman Palace-Car Company, claiming damages in the sum of \$15,000. The suit was removed by the defendant company to the United States circuit court for the Western district of Texas. Edmunson alleged that on the evening of July 3, 1896, he became a passenger on the Chicago, Rock Island & Pacific Railroad from Colorado Springs, Colo., to Chicago, Ill.; that he purchased a regular ticket for passage over said railroad; that he purchased from the agent of defendant an upper berth in one of its sleeping cars, to ride in and sleep in from Colorado Springs to Belleville, in the state of Kansas; that the defendant company was then engaged in the business of supplying passengers on said railroad with accommodations for sleeping during the night; that it was the duty of the defendant company to have had the roof and ventilating windows of the sleeper in which he rode and slept in a good, safe, and secure condition, so as to prevent water or rain from coming into the berth that plaintiff occupied; that, after occupying the berth during the night, he was awakened in the morning by water dripping in on his arm from the place above him, and he discovered that there was a wet place in his berth, near the head of the same, which had been caused by the water dripping into and upon the same, it having rained during the night (said wet place being about two feet long and two feet wide), and he found himself, when he woke, lying in said wet place, and as soon as he rose he discovered that he had, on account of said water having come into his berth, caught a severe cold; that the cold so contracted from the water having dripped into and having run into his berth continued to grow worse from day to day, and settled on his lungs; that he was finally prostrated by a high fever and severe coughing, and a pneumonic condition set in, and he continued to suffer exceedingly, and about the night of July 11, 1896, while he was coughing violently as the result of his becoming wet in said berth, a blood vessel was burst in his left lung, and he was attacked with a hemorrhage of the lungs; that he had hemorrhages for the next five days whenever an attack of coughing came; that he was confined to his bed until about August

¹ As to duties and liabilities of sleeping-car companies, see note to *Duval v. Car Co.*, 10 C. C. A. 335.