

the former case, the Court of Appeal had laid down the rule that, where the negligence of the servant causing the injury was one of omission, the action was founded on contract, and that it was only in case of misfeasance that it could be regarded as founded on tort; but the Court of Appeal (Lord Esher, M.R., and Smith and Rigby, L.JJ.) repudiated this interpretation of their former decision, and held that in such actions, where the negligence complained of constitutes a breach of duty, it is immaterial whether that negligence arise from either omission or commission, the action is, in both cases, founded in tort. Smith, L.J., thus explains the distinction between the effect of nonfeasance and misfeasance in such actions: "If the cause of complaint be for an act of omission or nonfeasance, *which, without proof of a contract to do what has been left undone, would not give rise to any cause of action* (because no duty apart from contract to do what is complained of exists), then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendant be such that a duty arises from that relationship, irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort."

PROBATE—WILL—CODICILS—IMPLIED REVOCATION—SUBSTITUTED OR CUMULATIVE LEGACIES.

*Chichester v. Quatrefages*, (1895) P. 186; 11 R. May 83, is the only case in the Probate Division which seems to call for notice here. The plaintiffs, who were the executors named in the will of E. J. Eyre, claimed probate of the will, and the second codicil thereto, and the exclusion from probate of the first codicil, contending that the second was intended in substitution for the first. The first codicil was made in the lifetime of the testator's wife, and by it he made a provision for her, gave directions for his burial and monument, and bequeathed pecuniary and specific legacies. After his wife's death, the testator took a draft of the first codicil, and altered it in order to make the second codicil. The second codicil referred to the will, but not to the first codicil of which it was a repetition, except that it contained dispositions consequent on the death of the testator's wife, and one legacy was increased after this codicil had been engrossed. There was no external evidence of the testator's intention as to the two codicils. The fact that certain specific gifts of chattels made by the first codicil were repeated in the second afforded,