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DISCUSSION OF RECENT DECISIONS

AUTOMOBILES—INJURIES FROM OPERATION, OR USE OF HIGHWAY—WHETHER OR NOT OWNER OF PARKED AUTOMOBILE WHO LEAVES KEY IN IGNITION IS RESPONSIBLE FOR INJURIES INFLICTED BY THIEF WHO STEALS CAR—The Illinois Supreme Court, faced with the need for resolving an apparent conflict of opinion between the Appellate Courts of the state,[1]

1 Compare the holding in Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537 (1948), noted in 27 CHICAGO-KENT LAW REVIEW 225, with the decision in Cockrell v. Sullivan, 344 Ill. App. 620, 101 N. E. (2d) 878 (1951), noted in 30 CHICAGO-KENT LAW REVIEW 277.

appears to have taken jurisdiction of the case of *Ney* v. *Yellow Cab Company*[2] on certificate of importance[3] for the purpose of resolving that conflict. The defendant therein, by its servant, negligently allowed a taxicab to stand unattended on a public street with the key in the ignition and the engine running, contrary to a certain provision of the Illinois Uniform Traffic Act.[4] A thief stole the taxicab and while in flight, ran into plaintiff's parked vehicle, causing property damage. The plaintiff's complaint charged that the breach of this statute constituted a prima facie case of negligence in that the defendant could reasonably have foreseen the consequences. Defendant's motion to dismiss and for judgment was denied, and judgment was entered for the plaintiff when defendant elected to stand by the motion. The Appellate Court for the First District affirmed the lower court's decision and the Supreme Court, one judge dissenting, also affirmed.

The general area of the law which relates to the effect on civil liability produced by a violation of a statute is one consisting of many finely drawn distinctions, many of which, upon examination, appear to be based more upon differences in statutory wording than upon rules of interpretation applied by the courts. In the majority of the cases, the violation of a statute which is penal in nature leads to a finding that such a breach amounts to negligence *per se* and is actionable at the instance of those persons for whose protection the statute was enacted.[5] Some courts, on

[2] 2 Ill. (2d) 74, 117 N. E. (2d) 74 (1954), noted in 42 Ill. B. J. 580, affirming 348 Ill. App. 161, 108 N. E. (2d) 508 (1953). Hershey, J., wrote a dissenting opinion.

[3] Ill. Rev. Stat. 1953, Vol. 2, Ch. 110, § 199(2).

[4] Ibid., Ch. 95½, § 189, in part, provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, or when standing upon any perceptible grade without effectively setting the brakes thereon and turning the front wheels to the curb or side of the highway." Punishment for the violation thereof is by fine to be imposed pursuant to Ch. 95½, § 234.

[5] Wolf v. Smith, 149 Ala. 457, 42 So. 824 (1906); Simoneau v. Pacific Electric R. Co., 166 Cal. 264, 136 P. 544 (1913); Lindsay v. Cecchi, 3 Boyce 133, 80 A. 523 (Dela., 1911); Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912 (1888); Curoe v. Spokane & I. E. R. Co., 32 Ida. 643, 186 P. 1101 (1920); Northern Indiana Transit Co. v. Burk, 228 Ind. 162, 89 N. E. (2d) 905 (1950); Burk v. Creamery Package Mfg. Co., 126 Iowa 739, 102 N. W. 793 (1905); Clements v. Louisiana Electric Light Co., 44 La. Ann. 692, 11 So. 51 (1892); Bahel v. Manning, 112 Mich. 24, 70 N. W. 327 (1897); Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543 (1889); Larson v. Webb, 332 Mo. 370, 58 S. W. (2d) 967 (1932); Conway v. Monidah Trust Co., 47 Mont. 269, 132 P. 26 (1913); Hoopes v. Creighton, 100 Neb. 510, 160 N. W. 742 (1916); Johnson v. Boston & M. R. Co., 83 N. H. 350, 143 A. 516 (1928); Cosgrove v. New York, C. & H. R. R. Co., 87 N. Y. 88 (1881); Stone v. Texas Co., 180 N. C. 546, 105 S. E. 425 (1920); Wilson v. Northern P. R. Co., 30 N. D. 456, 153 N. W. 429 (1915); Skinner v. Pennsylvania R. Co., 127 Ohio St. 69, 186 N. E. 722 (1933); Speight v. Simonsen, 115 Ore. 618, 239 P. 542 (1925); Jinks v. Currie, 324 Pa. 532, 188 A. 356 (1936); Eickhoff v. Beard-Laney, Inc., 199 S. C. 500, 20 S. E. (2d) 153 (1942); Wise v. Morgan, 101 Tenn. 273, 48 S. W. 971 (1898); Hayes v. Gainesville Street R. Co., 70 Tex. 602, 8 S. W. 491 (1888); Kilpatrick v. Grand Trunk R. Co., 74 Vt. 288, 52 A. 531 (1902); Norman v. Virginia-Pocahontas Coal Co., 68 W. Va. 405, 69 S. E. 857 (1910); Bentson v. Brown, 186 Wis. 629, 203 N. W. 380 (1925).

the other hand, would regard the statutory violation as supporting no more than a prima facie case of negligence,[6] sufficient to form a basis from which a jury might infer negligence but as to which no presumption at law would be raised.[7] Regardless of the determination by the court as to the evidentiary weight to be allotted to such facts, however, the plaintiff, in order to set forth and sustain the cause of action, must show (1) a causal connection existing between the statutory breach and the injury sustained by him,[8] (2) that the legislature intended to prevent the injury of which he complains,[9] and (3) that he is one of a group over whom such protection has been extended.[10]

Against this background, it might be said that those courts in the various jurisdictions with statutory provisions similar to the one construed in the instant case, and where the like problem has arisen, have had considerable difficulty in arriving at the legislative intention with the result that they have reached diametrically opposed conclusions under similar factual situations.[11] When so doing, they have regarded the necessary causal connection, without which responsibility for injuries resulting in the movement of an unattended vehicle would not attach, to be one substantially intertwined with the legislative purpose existing at the time of the enactment of the statutory provision involved. It would seem to be apparent, from an examination of these statutes, with their additional provisions in context requiring that brakes be set and wheels turned to the curb on a grade, that the ultimate purpose was one directed toward public safety and not one with respect to theft deterrence. Even so, a finding that the provision was either an anti-theft measure or a safety precaution would not, in itself, supply the necessary causal bridge since there would still have to be a showing that the harm complained of was the one

6 Johnson v. Pendergast, 308 Ill. 255, 139 N. E. 407 (1923); Rowley v. Cedar Rapids, 203 Iowa 1245, 212 N. W. 158 (1927); Fowler v. Enzenperger, 77 Kan. 406, 94 P. 995 (1908); Tarr v. Keller Lumber & Contr. Co., 106 W. Va. 99, 144 S. E. 881 (1928). See also annotation in 21 A. L. R. (2d) 20.

7 Chicago, B. & Q. R. Co. v. Metcalf, 44 Neb. 848, 63 N. W. 51 (1895).

8 Gibson v. Leonard, 143 Ill. 182, 32 N. E. 182 (1892).

9 Johnston v. Cornelius, 200 Mich. 209, 166 N. W. 983 (1918).

10 Routh v. Quinn, 20 Cal. (2d) 488, 127 P. (2d) 1 (1942); Rischof v. Illinois Southern R. Co., 232 Ill. 446, 83 N. E. 948 (1908).

11 Recovery has been allowed in Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N. E. (2d) 395 (1952); Galbraith v. Levin, 323 Mass. 255, 81 N. E. (2d) 560 (1948), overruling Malloy v. Newman, 310 Mass. 269, 37 N. E. (2d) 1001 (1941); Andersen v. Thiesen, 231 Minn. 369, 43 N. W. (2d) 272 (1950). Contra: Ross v. Hartman, 78 App. D. C. 217, 139 F. (2d) 14, 158 A. L. R. 1370 (1943), cert. den. 321 U. S. 790, 64 S. Ct. 790, 88 L. Ed. 1080 (1943), reversing Squires v. Brooks, 44 App. D. C. 320 (1916); Richards v. Stanley, — Cal. (2d) —, 271 P. (2d) 23 (1954). In the last mentioned case, the California Supreme Court refused to follow the rationale of the instant case, although familiar with the decision therein, because (1) no comparable statute was involved, and (2) the foreseeable risk of negligent driving by a thief was said to be no greater than the one believed present when an owner loaned his car to another.

which the legislature intended to avoid.[12] In that connection, it is pertinent to inquire whether the act of an intermeddler was one within the contemplation of the legislature.

The bulk of the cases dealing with negligence in parking and liability for resulting injury involve either a movement of the vehicle independently of human action or a movement brought about by the intervening acts of children. In the latter situation, provided the person leaving the car unattended had a substantial basis for believing that children might be tempted to meddle with the mechanism, he has generally been held to answer for the resulting damage.[13] A finding of this nature is due chiefly to the existence of the special added circumstance for the general rule has been stated to be that "where the car is started by a third person, any negligence there may be on the part of the owner in leaving it unattended is regarded as not the proximate cause of the injury, and therefore, there is held to be no liability."[14] Can it, then, be said that a special circumstance exists in the theft cases sufficient to take the case out of the realm of the general rule?

In the absence of statute or ordinance,[15] there has been little occasion for any divergence of opinion among the courts on the point of denying responsibility on the part of the owner for injury sustained through the negligent operation of an automobile by a thief, despite the fact the key was left in the vehicle,[16] as the theft has generally been regarded as an efficient intervening cause.[17] In that connection, the law quite uniformly

12 Where the measure has been determined to be one to promote precaution against theft, civil recovery will be denied: Sullivan v. Griffin, 318 Mass. 359, 61 N. E. (2d) 330 (1945). See also note in 35 Minn. L. Rev. 81.

13 Moran v. Borden, 309 Ill. App. 391, 33 N. E. (2d) 166 (1941); Lomano v. Ideal Towel Supply Co., 51 A. (2d) 888 (N. J. Dist., 1947); Connell v. Berland, 223 App. Div. 234, 228 N. Y. S. 20 (1928); Gumbrell v. Clausen Flanagen Brewery Co., 199 App. Div. 778, 192 N. Y. S. 451 (1922). The contrary result will follow if no reason to foresee tampering exists: Jackson v. Mills-Fox Baking Co., 221 Mich. 64, 190 N. W. 740 (1922); Kennedy v. Hedberg, 159 Minn. 76, 198 N. W. 302 (1924); Rhad v. Duquesne Light Co., 255 Pa. 409, 100 A. 262 (1917).

14 See 5 Am. Jur., Automobiles, § 338, at p. 684.

15 It should be noted that, even in the presence of a statute or ordinance, the terms thereof may be such as to prevent reliance thereon for the purpose of establishing civil liability: Richards v. Stanley, — Cal. App. (2d) —, 260 P. (2d) 277 (1953).

16 Roberts v. Lundy, 301 Mich. 726, 4 N. W. (2d) 74 (1942); Lotito v. Kyriacus, 272 App. Div. 891, 56 N. Y. S. (2d) 157 (1946), affirmed in 295 N. Y. 667, 65 N. E. (2d) 101 (1946); Walter v. Bond, 267 App. Div. 779, 45 N. Y. S. (2d) 378 (1943); Mann v. Parshall, 229 App. Div. 366, 241 N. Y. S. 673 (1930); Midkiff v. Watkins, 52 So. (2d) 573 (La. App., 1951); Castay v. Katz-Besthoff, Ltd., 148 So. 76 (La. App., 1933); Rhad v. Duquesne Light Co., 255 Pa. 409, 100 A. (2d) 262 (1917); Curtis v. Jacobson, 142 Me. 351, 54 A. (2d) 520 (1948); Reti v. Vaniska, Inc., 14 N. J. Super. 94, 81 A. (2d) 377 (1951); Saracco v. Lyttle, 11 N. J. Super. 254, 78 A. (2d) 288 (1951); Wright v. L. C. Powers & Sons, 238 Ky. 572, 38 S. W. (2d) 465 (1931).

17 The case of Neering v. Illinois Central R. Co., 383 Ill. 366, 50 N. E. (2d) 497 (1943), while not an automobile case, contains an excellent discussion on the point of intervening causation with respect to criminal acts by third persons.

recognizes that, where the intervening cause of the injury is a criminal act, even one made less difficult of performance by the first actor's negligence, the negligent person is not regarded as bound to foresee such crime, hence will not be held responsible[18] for the original negligence is said to be, at the most, no more than a remote cause. This severance in the causal connection is not one operative in all cases and under every set of circumstances for there may be times where the intervention of the criminal act might reasonably have been foreseen. For this reason, all of the surrounding circumstances must be taken into account, including the nature of the locale and the prevalence of crime, as these facts may have great bearing upon the ultimate degree of care imposed upon the negligent owner.[19] Additional factors of this character, while not disclosed in the opinion, may have lent some support for the finding in the instant case.

Another proposition which has been argued, and may have affected the decisions in cases of this nature, one which is also involved with the underlying issue of proximate cause and foreseeability, deals with the time lapse and distance intervening between the theft of the vehicle and the subsequent injury. Some courts have expressly disaffirmed the placing of any weight on the fact that the thief was in the act of fleeing at the time[20] but others appear to have placed great reliance upon that fact.[21] It would seem, however, that this point should be accorded some attention for, even in those jurisdictions which will allow recovery, it would seem to be pushing the doctrine to absurd lengths to say that the negligent owner should be held responsible for all subsequent negligent acts of the thief occurring while the thief continued in possession.[22] If this view ever became law it would be a move most strongly in the direction of making the owner an insurer with respect to every accident involving his vehicle no matter how far removed from his original negligence the ultimate injury

18 See, in general, 38 Am. Jur., Negligence, § 71, and annotation in 78 A. L. R. 471.

19 Some courts have seized upon this fact as providing an opportunity for the making of a favorable comparison between the crime rate in their own jurisdictions and that found in others. See, for example, Kiste v. Red Cab, Inc., 122 Ind. App. 587 at 596, 106 N. E. (2d) 396 at 399, where the court said: "We do not presume to affirm or deny that circumstances are highly probable in the District of Columbia or the First District of the Appellate Court of Illinois. We do assert with some satisfaction that such circumstances are not reasonably foreseeable in this jurisdiction."

20 Wannebo v. Gates, 227 Minn. 194, 34 N. W. (2d) 695 (1948).

21 Ostergard v. Frisch, 333 Ill. App. 359, 77 N. E. (2d) 537 (1948).

22 Search reveals no case in which the negligent owner has been held liable for an accident occurring at some time subsequent to what might be termed "flight." The dissenting opinion of Niemeyer, P. J., in Ostergard v. Frisch, 333 Ill. App. 359, 77N. E. (2d) 537 (1948), appears to turn on the fact that the record did not support a finding of "flight." Might not the owner be said to have done all he could to prevent further harm by reporting the theft to the police? That fact would tend to absolve him from any prosecution for violations of the criminal law arising after the theft of the car.

to the third party might be, a result not at all in harmony with the prevailing current doctrine that an automobile is not a dangerous instrumentality *per se*. Granted that the legislature may have intended to impose liability on the careless owner for the acts of the thief while in the course of his theft, there is nothing in the text of the statutory provision in question to suggest that the legislature ever intended to achieve so substantial an extension of common law principles.

While the Illinois Supreme Court, at the time of affirming the denial of the defendant's motion, indicated that the fundamental question was one for the determination of a jury[23] and that it did not wish to be understood as refusing, by implication, to follow the majority decision in the Palsgraf case,[24] it would seem that it has extended the conception of proximate cause, as delineated by Judge Cardozo in that decision, beyond reasonable limits in order to arrive at what some may claim to be a more just conclusion. Its finding that the legislature must be understood as having intended to provide a degree of protection from criminal acts by drafting a portion of a statute which, taken as a whole, could have only one apparent purpose, that of providing for protection from reasonably foreseeable movements of a vehicle, is one which is strained. That the violation of the provision would be negligence to some degree may be admitted but, in the absence of a clear revelation of the legislative mind,[25] it would seem unwarranted to extend the field of liability over so broad an area. As one writer has put it, "legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy."[26] The holding in the instant case, by contrast, provides virtually no boundary whatever.[27]

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[23] Courts which have allowed a recovery have not been uniform on this point but the difference seems to be based on the weight given to the negligence said to be present in a finding that the statute had been breached. See Ross v. Hartman, 78 App. D. C. 217, 139 F. (2d) 14, 158 A. L. R. 1370 (1943), as an example of a case where the question of causation was held to be a matter of law.

[24] Palsgraf v. Long Island R. Co., 248 N. Y. 339, 169 N. E. 99 (1928).

[25] If evidence is needed that the legislature knows how to write a statute so as to provide with certainty for both civil and criminal consequences for its violation, reference could be made to the "civil rights" provisions set forth in Ill. Rev. Stat. 1953, Vol. 1, Ch. 38, § 125 et seq.

[26] Prosser, Handbook of the Law of Torts (West Publishing Co., St. Paul, 1941), p. 312.

[27] It is to be expected that a modern jury, faced with a choice between deciding for a completely innocent injured plaintiff or in favor of a somewhat neglectful defendant, even though the latter was no more than careless with respect to the safety of his own property, would seldom hesitate to vote in favor of the former. Unless contributory negligence could be shown, the defendant would then be without any really effective defense.

CHATTEL MORTGAGES — CONSTRUCTION AND OPERATION — WHETHER CHATTEL MORTGAGE DESIGNED TO RUN LONGER THAN STATUTORY LIEN PERIOD IS VOID FROM INCEPTION — Interpretation of an Illinois statute regulating the duration of chattel mortgages[1] was called for in the recent case of *In re Beale*,[2] a matter heard by the United States District Court for the Northern District of Illinois. The reclamation petition filed therein alleged that one Beale had executed an installment note in favor of the petitioners and had given a chattel mortgage to secure the same. By the terms of these instruments, final payment on the debt was to be made five years and three months after the date thereof. Prior to maturity, and while a substantial balance remained unpaid on the debt, the mortgagor was adjudged an involuntary bankrupt and his assets, including the mortgaged property, came into the hands of a receiver in bankruptcy who refused to surrender the goods to petitioner on the claim the mortgage was void *ab initio*. The Referee so ruled but the District Court reversed, remanding the matter with instructions to treat the chattel mortgage as effective, at least for the period fixed by the statute, despite its overly-extended duration.

Every American jurisdiction possesses a statutory system providing for the filing or recording of chattel mortgages, all with the object of giving notice to third persons of the existence of the mortgage and of the lien afforded thereby as a substitute for the common law notice provided by delivery of possession of the mortgaged chattels to the mortgagee. While these statutes agree as to the object to be attained, they differ widely in the method to be pursued to accomplish that objective. In general, however, they agree on the point that the lien period should not be left entirely to the agreement of the parties but should be confined to statutory limits, varying from two to six years, with the possibility of an effective extension of the original force of the chattel mortgage under some form of renewal executed or filed in the manner directed by statute.[3] An additional purpose served by these statutes, particularly those providing that a chattel mortgage shall be void as against creditors and subsequent purchasers of the mortgagor after the expiration of the statutory period, is to clear the record by raising a conclusive presumption of payment in the event there is no filing of a renewal affidavit prior to the expiration of the statutory period.[4]

1 Ill. Rev. Stat. 1953, Vol. 2, Ch. 95, § 4, states: "No mortgage . . . of personal property . . . shall be valid . . . unless it shall be deposited for filing . . . Provided that the period of such mortgage . . . shall not exceed five years from the receipt of such instrument for filing."

2 117 F. Supp. 149 (1953).

3 Jones, Chattel Mortgages and Conditional Sales (Bobbs-Merrill Co., Indianapolis, 1933), 6th Ed. by Bowers, Vol. 1, Ch. 6, §§ 190-235.

4 Hanson v. Blum, 53 N. Dak. 526, 207 N. W. 144 (1926).

Against this general background, the Referee, denying petitioner's prayer for reclamation, had relied on an earlier Illinois case, that of *Silvis* v. *C. Altman & Company,*[5] which had held a similar chattel mortgage void *ab initio.* That result had been attained under a chattel mortgage statute then in effect which provided in substance that a chattel mortgage would be valid until maturity of the entire obligation "provided such time shall not exceed two years."[6] The phrase "such time" was there construed to require that the entire debt should mature within two years on the ground that, if it did not, the mortgage would violate the express wording of the statute, hence would be void from inception. In reversing the Referee, the District Court distinguished that statute, as so construed, from the one presently in force[7] on the ground the purpose of the present statute, from its amended wording, was one designed to provide for a limitation on validity rather than to invalidate the chattel mortgage from the start. As so construed, the statute served to limit the effective lien period of the mortgage but not to invalidate the debt itself.

This construction of the present Illinois statute appears to be more in conformity with those Illinois cases which arose since the Silvis case but which were based on later amendments to the original 1874 statute. In *Jones* v. *Noel,*[8] for example, the court said that a chattel mortgage lien, being nothing more than a statutory creature, could continue no longer than the period within which the mortgage complied with statutory requirements. This, in effect, meant that a chattel mortgage which matured beyond the statutory period would be valid, at least during such period, rather than void from its inception. The still later case of *Keller* v. *Robinson,*[9] decided under the 1891 amendment,[10] an amendment which authorized the extension of the maturity of the mortgage upon the filing of a proper affidavit showing renewal, likewise indicated that extension of the lien beyond the then two-year period depended only upon the filing of the required affidavit.[11] The issue was again raised in the case of *Friend* v. *Johnson*[12] but the court there avoided giving an opinion on the particular proposition. It did, however, following upon the 1931 amendment to the

5 141 Ill. 632, 31 N. E. 11 (1892).

6 Rev. Stat. 1874, Ch. 95, § 4.

7 Ill. Rev. Stat. 1953, Vol. 2, Ch. 95, § 4.

8 139 Ill. 377, 28 N. E. 805 (1890).

9 153 Ill. 458, 38 N. E. 1072 (1894). See also Fallows v. Continental & Commercial T. & S. Bank, 235 U. S. 300, 35 S. Ct. 29, 59 L. Ed. 238 (1914).

10 Ill. Laws 1891, p. 171, § 1.

11 The holding therein may be said to have revived the early decision of Cook v. Thayer, 11 Ill. 617 (1850), where it was said that a chattel mortgage, the maturity date of which exceeded the then statutory lien period, would be valid during the period but not afterward.

12 68 Ill. App. 661 (1896).

statute,[13] again face the point in the case of *Busch* v. *Tatar*[14] where it rendered a clear and direct opinion which, in effect, affirmed the Keller case.

The holding in the instant case, giving interpretation to the statute as last amended in 1953,[15] properly agrees with the earlier views so noted for, as now worded, the present statute is essentially no different than it was then although the duration of the several time periods has been enlarged. The principal issue discussed, however, arises wholly because of inadequate statutory wording. The problem could be avoided if the statute, after specifying the steps necessary to create a valid lien, then continued with a statement to the effect that the chattel mortgage should cease to be valid after the expiration of a designated number of years from the date of filing unless renewed by proper affidavit. Such language would eliminate the problem of whether or not a chattel mortgage designed to run longer than the statutory lien period would be void *ab initio.*

J. M. BROWN

CORPORATIONS—DISSOLUTION AND FORFEITURE OF FRANCHISE—WHETHER A DISSOLVED CORPORATION CAN BE SUBJECTED TO A CRIMINAL PROSECUTION—The United States, prosecuting in the recent case of *United States* v. *P. F. Collier & Son Corporation,*[1] filed a criminal information against a Delaware corporation charging it with a violation of the Fair Labor Standards Act.[2] A motion to quash the service and to dismiss the information was made on behalf of the corporation on the ground that it had been dissolved under an applicable Delaware statute more than eight months prior to the filing of the information. This motion was sustained in the district court on the theory that a corporation, after dissolution, may not be subjected to a criminal prosecution for acts committed prior to dissolution. On appeal, the Court of Appeals for the Seventh Circuit held to the contrary when it concluded that a pertinent Delaware statute,[3]

13 Ill. Laws 1831, p. 669, § 1.

14 271 Ill. App. 8 (1933). The holding therein accords with the decision in Reynolds v. Case, 60 Mich. 76, 26 N. W. 838 (1886), and in First National Bank of Yankton v. Magner, 47 S. Dak, 80, 195 N. W. 1020 (1923).

15 Ill. Laws 1953, p. 1274; H. B. No. 960.

1 208 F. 936 (1953). Finnegan, J., wrote a concurring opinion.

2 29 U. S. C. A., § 201 et seq.

3 Dela. Rev. Code 1935, Ch. 65, § 42, as amended by Dela. Laws 1941, Ch. 132, § 11, provides as follows: "All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate for the purpose of prosecuting and defending suits by or against them . . . and with respect to any action, suit or proceeding begun or commenced by or against the corporation within three years after the date of such expiration or dissolution, such corporation shall only

one which provided that any action, suit, or proceeding could be brought by or against a dissolved corporation within three years after dissolution, was broad enough to encompass all forms of litigation and to provide for the survival of remedies, including criminal prosecutions.

It is now generally conceded that a corporation may be held criminally, as well as civilly, liable for its acts,[4] particularly for crimes wherein intent is not a necessary element,[5] but cases do exist where corporations have been held guilty of such crimes as larceny,[6] obtaining money under false pretense,[7] criminal libel,[8] and homicide.[9] While the corporation cannot be arrested or incarcerated, it may be fined and, in addition, be dissolved under appropriate proceedings, especially for having committed crimes in which an intent is required.[10] It is also another generally established legal principle that a corporation, upon dissolution, is legally dead and without existence[11] so, in the absence of a statute continuing the existence of the defunct corporation for the purpose of suit, no action can be brought by or against a dissolved corporation[12] and all actions pending

for the purpose of such actions, suits or proceedings so begun or commenced be continued bodies corporate beyond said three-year period and until any judgments, orders, or decrees therein shall be fully executed."

[4] American Medical Association v. United States, 317 U. S. 519, 63 S. Ct. 327, 87 L. Ed. 434 (1943); New York Central v. United States, 212 U. S. 481, 29 S. Ct. 304, 53 L. Ed. 613 (1909); Boyd v. United States, 275 F. 16 (1921); United States v. American Socialist Society, 260 F. 885 (1919); United States v. Nearing, 252 F. 223 (1918); People v. Strong, 363 Ill. 602, 2 N. E. (2d) 942 (1936).

[5] People v. Saline County Coal Co., 206 Ill. App. 266 (1917).

[6] People v. Canadian Fur Trappers' Corp., 248 N. Y. 159, 161 N. E. 455, 59 A. L. R. 372 (1928); People v. Hudson Valley R. Co., 217 N. Y. 172, 111 N. E. 472 (1916).

[7] Sigretto v. State, 127 N. J. L. 518, 24 A. (2d) 199 (1942).

[8] Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N. E. 445, 44 A. L. R. 159 (1899).

[9] State v. Lehigh Valley R. Co., 90 N. J. L. 372, 103 A. 685 (1917); People v. Orzel, 263 N. Y. 200, 188 N. E. 648 (1934).

[10] In People v. Duncan, 363 Ill. 495, 2 N. E. (2d) 705 (1936), the court said that a corporation could not be indicted for the violation of a criminal statute where the punishment consisted of imprisonment or death only, but in case the statutory penalty amounted to both fine and imprisonment it could be punished by the imposition of a fine. See also State v. Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58 (1910).

[11] Pendleton v. Russell, 144 U. S. 640, 12 S. Ct. 743, 36 L. Ed. 574 (1892); First Nat. Bank of Selma v. Colby, 88 U. S. (21 Wall.) 609, 22 L. Ed. 687 (1875); Mumma v. Potomac Co., 33 U. S. (8 Pet.) 281, 8 L. Ed. 945 (1834). In Markus v. Chicago Title & Trust Co., 373 Ill. 557, 27 N. E. (2d) 463, 128 A. L. R. 567 (1940), the court held that the dissolution of a corporation is, in legal effect, the same as the death of a natural person. See also Shore Management Corp. v. Erickson, 314 Ill. App. 571, 41 N. E. (2d) 972 (1942).

[12] Hanson v. McLeod, 174 Ark. 270, 294 S. W. 998 (1927); Young Construction Co. v. Dunne, 123 Kan. 176, 254 P. 323 (1927); United States Truck Co. v. Penn. Surety Corp., 259 Mich. 422, 243 N. W. 311 (1932); MacAffer v. Boston & M. R. Co., 242 App. Div. 140, 273 N. Y. S. 679 (1934); Oklahoma Natural Gas Co. v. McFarland, 143 Okla. 252, 288 P. 468 (1930); Mt. Union v. Kunz, 290 Pa. 356, 139 A. 118 (1927); Shepherd v. Kress Box Co., 154 Va. 421, 153 S. E. 649 (1930).

at the time of dissolution must be abated.[13] It follows, therefore, that a dissolved corporation, guilty of criminal acts during the period of its existence, may be prosecuted criminally or sued civilly only if and to the extent expressly authorized by the law of the state of its incorporation.[14] Unless that law provides for criminal prosecution subsequent to dissolution, the state would be helpless in its efforts to punish the dissolved corporation for its crime.

Returning to the case at hand, it must be noted that the court was faced with the problem of construing the pertinent Delaware statute without the aid of any local interpretation on the point for there does not appear to be a single Delaware decision construing the statute in the light of the problem under discussion. While the court could have used a variety of legal rules concerning statutory construction, it simply declared that there was "no room to speculate on the legislative intent"[15] saying the statute was plainly intended to include criminal proceedings, hence there was no reason to go behind the language of the act. In that connection, it admitted that many jurisdictions have held that such terms as "any action" or "any suit" would not be broad enough in scope to include criminal prosecutions, being terms most frequently used to refer to civil matters,[16] but there was said to be abundant authority for the holding that the word "proceeding" would be broad enough, in ordinary and usual legislative and judicial usage, to include criminal matters.[17]

13 Newhall v. Western Zinc Mining Co., 164 Cal. 380, 128 P. 1049 (1912); Bruin v. Katz Drug Co., 351 Mo. 731, 173 S. W. (2d) 906 (1943).

14 Defense Supplies Corporation v. Lawrence Warehouse Co., 336 U. S. 631, 69 S. Ct. 762, 82 L. Ed. 147 (1949); Chicago Title & Trust Co. v. 4136 Wilcox Building Corporation, 302 U. S. 120, 58 S. Ct. 125, 80 L. Ed. 147 (1937); Oklahoma Natural Gas. Co. v. Oklahoma, 273 U. S. 257, 47 S. Ct. 391, 71 L. Ed. 634 (1927); O'Neill v. Continental Illinois Co., 341 Ill. App. 119, 93 N. E. (2d) 160 (1950). But see the case of Dr. Hess & Clark, Inc. v. Metalsalts Corp., 119 F. Supp. 427 (1954), where the court held that a dissolution in the state of incorporation would have no bearing on the right to sue the dissolved corporation in a state where it had been licensed to do business if the corporation had not also complied with the dissolution provisions of the latter state.

15 208 F. (2d) 936 at 940.

16 Weston v. City Council of Charleston, 27 U. S. (2 Pet.) 289, 7 L. Ed. 481 (1829); Pope v. State, 124 Ga. 801, 53 S. E. 384 (1906); Commonwealth v. Gallo, 275 Mass. 320, 175 N. E. 718 (1931); Worcester Color Co. v. Wood's Sons Co., 209 Mass. 105, 95 N. E. 392 (1911); Patterson v. Standard Accident Ins. Co., 178 Mich. 288, 144 N. W. 491 (1913); Hodges v. Lassiter, 96 N. C. 351, 2 S. E. 923 (1887). For contrary decisions, see United States v. Backer, 134 F. (2d) 533 (1943); Gund Brewing Co. v. United States, 204 F. 17 (1913); United States v. Moore, 11 F. 248 (1882); Kelliher v. People, 71 Colo. 202, 205 P. 274 (1922); Commonwealth v. Moore, 143 Mass. 136, 9 N. E. 25 (1886).

17 United States v. Schalliger Produce Co., 230 F. 290 (1914); United States v. Auerbach, 68 F. Supp. 776 (1946); Lindsay v. Allen, 113 Tenn. 517, 82 S. W. 648 (1904). Of particular significance is the repeated use of the term "proceeding" in the Federal Rules of Criminal Procedure. See Rules 20, 21(a), 21(b), 21(c), 53, 54(b)(4), and 54(b)(5) for instances in which the term has been used without the qualifying adjective "criminal." In Rules 1, 2, 12(a), 39(b)(1), 46(b), 55, and 59, however, the term has been modified by the qualifying adjective. See also United States v. Borden Co., 28 F. Supp. 177 (1939).

The leading case to the contrary conclusion, however, is that of *United States* v. *Safeway Stores, Inc.*[18] In that case, a criminal action had been instituted against six corporations which had been organized in four different states but all of which corporate defendants had been dissolved prior to the return of the indictment. All of the corporate defendants argued that the action should be abated and the Court of Appeals for the Second Circuit supported the view that the Delaware[19] and Nevada[20] statutes, which authorized the post-dissolution prosecution and defending of "suits by and against them," applied only to civil suits; that the California statute,[21] with its reference to "actions by or against" the corporation, did not embrace criminal prosecutions; and the Texas statute,[22] providing for the survival of "judicial proceedings," was not applicable. The Court of Appeals for the Tenth Circuit, in the case of *United States* v. *Line Material Company*,[23] one in which a defendant Delaware corporation, dissolved by merger several months after the return of the indictment, was also successful in raising the defense of dissolution to defeat a criminal prosecution, has likewise adopted the view that the precise statute involved in the instant case pertains only to civil suits in contrast to criminal actions. The current holding is, therefore, not one free from doubt.

Another approach to the problem at hand may be seen in the case of *United States* v. *Leche*.[24] The federal government there instituted a proceeding against a Texas corporation to recover a fine for the commission of a public offense and was met with a motion to abate the proceedings on the ground the corporation, subsequent to the return of the indictment, had been dissolved under an appropriate state statute.[25] The court, dismissing the action, appears to have erroneously reasoned that a state statute could have no effect on a criminal proceeding based upon a violation of a federal statute but then went to the length of saying that, as the cause of action arose under a federal statute and the proceeding was

18 140 F. (2d) 834 (1944).

19 The statute is set forth in note 3, ante. It is interesting to note that the court completely ignored the word "proceeding" used in that statute.

20 Nev. Comp. Laws 1929, § 1664, in part reads as follows: "All corporations, whether they expire by their own limitation, or are otherwise dissolved, shall nevertheless for the term of three years from such expiration or dissolution be continued as bodies corporate for the purpose of prosecuting and defending suits by or against them. . . ."

21 Cal. Civ. Code 1941, § 399, refers to continued existence "for the purpose of winding up its affairs, prosecuting and defending actions," but specifies that no "action or proceeding to which a corporation is a party shall abate by the disssolution" of the corporation. Again, the court ignored the word "proceeding" on which the court concerned with the instant case placed much importance.

22 Vernon's Anno. Civ. Tex. Stat. 1936, Vol. 3, § 1388.

23 202 F. (2d) 929 (1953).

24 44 F. Supp. 765 (1942).

25 Vernon's Anno. Civ. Tex. Stat. 1936, Vol. 3, § 1390.

brought in a federal court, the effect of the dissolution of the corporation would, in the absence of a federal statute on the subject, have to be decided on the basis of the common law, which did not permit an action to survive the death of the corporation.[26] The case is not cited for its legal significance so much as to evidence the tortuous reasoning some courts will apply in dealing with this problem.

It is recognized that, pursuant to those decisions which hold contrary to the instant case, a corporation faced with a criminal proceeding could abate the action by dissolving, merging, or consolidating and thereby free itself from criminal liability in a fashion which would practically invite, if not encourage, corporations to violate the law,[27] hence the instant case, construing the Delaware statute to include criminal as well as civil actions, strikes at a potential evil even if it is not the better-reasoned of the decisions. In the absence of a decision by the United States Supreme Court and with no state court decision providing a binding local interpretation,[28] there would seem to be occasion for all law makers to examine their own state statutes to determine whether they provide for a survival of criminal as well as civil remedies and, if they do not,[29] to make suitable statutory changes so as to prevent corporations from circumventing the criminal law.

H. J. JOSTOCK, JR.

DEATH—ACTIONS FOR CAUSING DEATH—WHETHER OR NOT DEATH OF DECEDENT'S ONLY HEIR AND NEXT OF KIN DURING PENDENCY OF ACTION FOR WRONGFUL DEATH REQUIRES DISMISSAL OF ACTION—The doctrine of *stare decisis* appears to have gained new stature by reason of the decision in the recent Ohio case of *Danis* v. *New York Central Railroad Company*.[1] The decedent there concerned had been struck and killed by a locomotive owned and operated by the defendant. Suit was brought by the adminis-

[26] Sullivan v. Associated Bill Posters and Distributors, 6 F. (2d) 1000, 42 A. L. R. 503 (1925).

[27] Marcus, "Liability of Dissolved Corporations," 58 Harv. L. Rev. 675 (1945). But see Pierce v. United States, 255 U. S. 398, 41 S. Ct. 365, 65 L. Ed. 691 (1921), as to the right to follow the corporate property into the hands of transferees and former shareholders.

[28] It would control, if one did exist, by virtue of the holding in Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938).

[29] The terminology of the Illinois statute on the subject should prove to be of interest. Ill. Rev. Stat. 1953, Vol. 1, Ch. 32, § 157.94, in part, states: "The dissolution of a corporation . . . shall not take away or impair *any remedy* available to or against such corporation . . . for any right or claim existing, or *any liability incurred*, prior to such dissolution if action or other proceeding . . . is commenced within two years after the date of such dissolution." Italics added. The statute would appear to be all-inclusive, but it has not yet received local interpretation on the point here concerned.

[1] 160 Ohio St. 474, 117 N. E. (2d) 39 (1954), affirming — Ohio App. —, 106 N. E. (2d) 308 (1951). Weygandt, Ch. J., wrote a dissenting opinion.

trator of the decedent's estate on behalf of the heir and next of kin to recover for the wrongful death.[2] During the pendency of this action the only heir died, leaving heirs surviving her. On motion of the defendant, the trial court directed a verdict in favor of the defendant inasmuch as no one remained, within the statutory class of beneficiaries, in whose behalf the action could be further prosecuted. The Ohio Court of Appeals affirmed this judgment and, on allowance of a motion to certify the record, the Supreme Court of Ohio also affirmed, basing their decision on a precedent dating back some forty-five years.[3] The majority opinion indicated that, if the case had been one of first impression, the court would probably have held the other way, but the judges generally felt themselves constrained to follow precedent, hence achieved the result mentioned.

The decision rendered in the instant case receives some support from holdings achieved in other jurisdictions[4] and criticism is not being directed at the result attained, but the method employed in arriving at the decision is one worthy of comment. The doctrine of "intellectual honesty," upon which much of the esteem shown for the judicial branch of the government has been based, has apparently been disregarded in favor of the more easily followed and less demanding doctrine of *stare decisis*. Certainly, there is no other readily discernible reason for a court's resting its holding on one old case when it believed the contrary view would have been the one to adopt had the case been one of first impression.[5] As the state of the law on the issue presented has been greatly modified since the older case was decided, a point which the court did not choose to analyze with anything resembling an "open" mind, the Supreme Court of Ohio appears to have contributed little toward the clarification of another of those issues which have arisen from carelessly-drawn legislative enactments.

It may be noted that the wrongful death statutes, in general, specify three classes of beneficiaries who are entitled to recover for the wrongful death, namely (1) the surviving spouse or children, (2) parents, if no spouse or child survives, and (3) next of kin, if there is no surviving spouse, child or parent. The mere factor of relationship, however, does not entitle a member of the aforementioned classes to a recovery, for there

[2] The action was based on Ohio Rev. Code, § 2125.02. It, like most such statutes, restricts recovery to a limited class of statutory beneficiaries. Compare with Ill. Rev. Stat. 1953, Vol. 1, Ch. 70, § 2.

[3] Doyle, Adm'x v. B. & O. R. Co., 81 Ohio St. 184, 90 N. E. 165 (1909).

[4] The cases are listed in an annotation in 13 A. L. R. 225 as supplemented by later annotations in 34 A. L. R. 162 and 59 A. L. R. 760.

[5] The majority opinion illustrates the truth of the old adage that there is no more effective way to defeat justice than simply to delay it. In the first of the Ohio cases, the alleged wrongful death occurred in the year 1888 and final decision was not rendered until twenty-one years later. In the instant case, the alleged wrongful death occurred over eight years ago.

is a further statutory requirement that the beneficiary must have sustained a "pecuniary" loss by the death as the statutes fall into the loss-of-support rather than the survival-of-remedy category. Assuming that the interested persons have sustained such a loss, the first important question to be considered is the effect of the death of a beneficiary or beneficiaries of a prior class upon the rights of the beneficiaries of a subsequent class.

Two answers have been given to this question. In *Chicago, Burlington & Quincy Railroad Company* v. *Wells-Dickey Trust Company*,[6] for example, a sister of the deceased brought suit for his wrongful death and the defendant filed a motion to dismiss after learning that the decedent's mother had survived him but had died prior to commencement of the action. The court held that the beneficial interest did not shift, following the death of the member of the prior class, to a member of the subsequent class and the failure to bring action in the mother's lifetime had not resulted in creating a new cause of action, upon the mother's death, for the benefit of the sister. This view was followed in the Indiana case of *Shipley* v. *Daly*,[7] the court there stating that, if there were no survivors of the first class, the right of action would accrue to the benefit of the second class, if any, and if none, then to the benefits of those of the third class, but that the right, once it had accrued, was not transmissible from the beneficiaries of one class to the next succeeding class. In contrast thereto, in the cases of *Garrard* v. *Mahoning Valley Railroad Company*[8] and *Arendt* v. *Kratz*,[9] it was held that if the preferred beneficiary had died before suit was instituted, the cause of action could be maintained in behalf of the surviving beneficiaries of the next entitled class.[10]

Accepting for this purpose, the view that the right of action does not shift between the designated classes, the question then becomes one as to whether or not, upon the death of the favored beneficiary, the action survives, as a property right, for the benefit of such person's estate, if not enforced during lifetime, or whether the cause must abate upon the death of the prime beneficiary.[11] In *Odlivak* v. *Elliott*,[12] an action brought by

6 275 U. S. 161, 48 S. Ct. 73, 72 L. Ed. 216, 59 A. L. R. 758 (1927).

7 106 Ind. App. 443, 20 N. E. (2d) 653 (1939).

8 100 Ohio St. 212, 126 N. E. 53 (1919). The holding therein is to be distinguished from the one in the instant case on the point of whether or not the prior beneficiary had instituted suit.

9 258 Wis. 437, 46 N. W. (2d) 219 (1951).

10 See also Elkin v. Southern Ry., 156 S. C. 390, 153 S. E. 337 (1930).

11 In those instances where, by statute, the action is to be conducted by a personal representative, albeit for the particular benefit of a specified class of statutory beneficiaries, the death of the personal representative, whether before or after suit has been begun, should be of no significance as the successor personal representative, upon appointment, would be vested with all rights belonging to the predecessor: Kurth v. Forreston State Bank, 348 Ill. App. 581, 109 N. E. (2d) 795 (1952).

12 82 F. Supp. 607 (1949).

an administrator on behalf of the widow of the decedent, who had died nine hours after her husband, it was held that rights accruing under the statute[13] to the widow would not be abated by her death but would survive to her estate[14] on the basis that an action for wrongful death is a suit for an injury done to the property rights of the beneficiary which, once accrued, would not be extinguished by the death of the specific beneficiary.[15] The damages recoverable would, however, be limited to the pecuniary loss suffered up to the time of the beneficiary's death.[16]

The opposing view, exemplified in the instant case, and followed in a few jurisdictions,[17] has been exposed to criticism in the case of *Van Beeck* v. *Sabine Towing Company*.[18] Mr. Justice Cardozo there traced the history of wrongful death actions from the original Lord Campbell's Act[19] to the present time and provided a most thorough analysis of the problem at bar. He did not disturb the prior holding to the effect that the beneficial interest would not shift from one class to another[20] but did point out that, in the situation before him, the cause ought not to abate, saying: "Death statutes have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied."[21] Inasmuch as the death of the wrongdoer does not operate to destroy the cause of action,[22] it is difficult to understand why the death of the statutory beneficiary, whether before or after suit has been begun, should produce a contrary result.

Any attempt to correlate the principles here enumerated with the Illinois law on the subject requires the consideration of two important

[13] N. J. Rev. Stat. 1937, Ch. 47, § 2:47-1. The statute is similar in content to Ill. Rev. Stat. 1953, Vol. 1, Ch. 700, § 2.

[14] The cases of Southern Pine Elec. Power Ass'n v. Denson, 214 Miss. 397, 57 So. (2d) 859 (1952), and Greco, Adm'r v. S. S. Kresge Co., 227 N. Y. 26, 12 N. E. (2d) 557 (1938), have also promulgated similar rulings based on statutes to be found in these states.

[15] White v. A. T. & S. F. Ry. Co., 125 Kan. 537, 265 P. 73 (1928); Stutz v. Guardian Cab Corp., 273 App. Div. 4, 74 N. Y. S. (2d) 818 (1947).

[16] Dostie v. Lewiston Crushed Stone Co., 136 Md. 284, 8 A. (2d) 393 (1939).

[17] Rogers v. Fort Worth & D. C. Ry. Co., 91 S. W. (2d) 458 (Tex. Civ. App., 1936); Gilkeson v. Missouri P. Ry. Co., 222 Mo. 173, 121 S. W. 138, 17 Ann. Cas. 763 (1909); Schmidt v. Menasha Woodenware Co., 99 Wis. 300, 74 N. W. 797 (1898).

[18] 300 U. S. 342, 57 S. Ct. 452, 81 L. Ed. 685 (1937).

[19] 9 & 10 Vict., c. 93 (1846). This earliest of the wrongful death statutes has served as a model for most American enactments.

[20] Chicago, B. & Q. Ry. Co. v. Wells-Dickey Trust Co., 275 U. S. 161, 48 S. Ct. 73, 72 L. Ed. 216 (1927).

[21] 300 U. S. 342 at 350-1, 57 S. Ct. 452, 81 L. Ed. 685 at 690.

[22] Hunt v. Authier, 28 Cal. (2d) 288, 169 P. (2d) 913 (1946).

cases.[23] In *Union Steamboat Company* v. *Chaffin's Administrators*,[24] a federal court, applying the law of Illinois, held that a right of action for wrongful death accrued immediately upon that death, became an asset of the beneficiary, and was not affected by the subsequent death of such beneficiary. The second case, that of *Wilcox* v. *Bierd*,[25] however, tends to generate some doubt on the point. The decedent there concerned, together with his wife and two children, rode in a car which was struck by defendant's locomotive. The wife and one child were killed instantly and the decedent died ten minutes later. The other child, who was nine months old at the time, died thirty minutes after the decedent from injuries sustained in the collision. An administrator sued on behalf of this infant and the decedent's parents, whom he had helped to support. It was held that, upon the death of the infant child, the cause of action abated and no right of action survived for the benefit of the parents of the decedent since they were not in the same class of beneficiaries. If the rule of the case was no broader than one to the effect that, upon the death of the sole beneficiary of the preferred class, the cause of action would not shift to a subsequent class, the two cases could be said to be in harmony. Insofar as the cause of action on behalf of the infant abated, however, the two cases are in conflict. It is worthy of notice that, since the infant lived only thirty minutes longer than the decedent, the pecuniary loss suffered was negligible so the court, for practical reasons, may have decided to disallow the claim rather than award nominal damages. Nevertheless, the case has been cited in support of the doctrine that the right of action will abate on the death of the beneficiary in whom the cause of action resides.[26]

This noting of the apparently divergent holdings in the only two cases wherein the Illinois statute has been applied to the problem generated by the death of an entitled beneficiary before recovery, leads to the suggestion that Illinois could readily assume a leading position in the field, in addition to providing clarification for its own law, if the legislature would amend the statute to provide specifically for either abatement or survival of the cause of action upon the death of the preferred beneficiary.[27] If it does so act, it should support the idea of survival of remedy.

P. J. SHANNON

[23] Ill. Rev. Stat. 1953, Vol. 1, Ch. 70, § 2, like most such statutes, is intended to preserve the specified beneficiary's right to support. If no beneficiary survives, the cause of action is then limited to a minor one for burial expenses and the like. See, however, the case of Gustafson v. Consumers Sales Agency, 414 Ill. 235, 110 N. E. (2d) 865 (1953), for an illustration of the length to which a court may go, from the procedural standpoint, to sustain a wrongful death case if possible.

[24] 204 F. 412 (1913), cert. den. 229 U. S. 620, 33 S. Ct. 778, 57 L. Ed. 1354 (1913).

[25] 330 Ill. 571, 162 N. E. 170 (1928).

[26] See 26 C. J. S., Death, § 40.

[27] Tenn. Code 1932, §§ 8242-3, provides an illustration of what could be done.

INTERNAL REVENUE—INCOME TAXES—WHETHER A TAXPAYER, IN COMPUTING NET INCOME FOR FEDERAL INCOME TAX PURPOSES, MAY DEDUCT ATTORNEYS' FEES PAID TO DEFEND AGAINST A DEFICIENCY ASSESSMENT FOR FEDERAL ESTATE TAXES—In the form of the case of *Northern Trust Company* v. *Campbell*,[1] a federal court has once again been provided with an opportunity to pass upon the right of a taxpayer to deduct non-business attorneys' fees from his gross income for income tax purposes. On the facts of the case, taxpayer's father had created a trust in 1934 under which he had named his wife as life beneficiary and his son, the taxpayer in question, as remainderman. The wife died shortly after the husband and the taxpayer became entitled to the corpus of the trust. The Commissioner of Internal Revenue, after the father's estate had been closed, claimed that an estate tax was due on the corpus of the trust[2] and that the taxpayer, as transferee, was liable for the alleged estate tax deficiency.[3] The taxpayer paid under protest, was successful in his suit to recover the overassessment,[4] but was forced to expend a substantial sum for attorneys' fees in that connection so deducted this expenditure from his current federal income tax return. The taxing authorities rejected the deduction and forced payment of an increased income tax. Plaintiff, as trustee under the will of the taxpayer, then filed suit to recover this alleged overpayment and not only secured a favorable judgment in the lower court but also, on the Collector's appeal to the Court of Appeals for the Seventh Circuit, succeeded in sustaining the tax deduction.

Plaintiff's theory of recovery had been based upon Section 23(a)(2) of the Internal Revenue Code,[5] his argument being that, as he had been obliged to bring suit to conserve the size of his own property interest as a remainderman from illegal taxation, the legal fees incurred in that suit constituted an expense directly incurred by the taxpayer in relation to the "conservation" of his income-producing property. Defendant, on the other hand, centered the defense on Section 24(a)(1), with its prohibition

1 211 F. (2d) 251 (1954).

2 The claim was predicated upon 26 U. S. C. A. § 811(c).

3 26 U. S. C. A. § 827(b) states: "If . . . the decedent makes a transfer, by trust or otherwise, of any property in contemplation of or intended to take effect in possession or enjoyment at or after his death . . . and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer . . . shall be subject to a like lien equal to the amount of such tax."

4 See McKinstry v. Harrison. The holding therein was not officially reported but may be noted in 34 A. F. T. R. 1670.

5 26 U. S. C. A. § 23(a)(2) states that, in computing net income, there shall be allowed as deductions "all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

against the deduction of "personal" expenses,[6] and Section 827(b), designed to make the transferee "personally" liable for an estate tax deficiency.[7] On this argument, the court concluded that it "is not the personal liability but rather the nature of the expense itself, and the proximate relation to the business or income-producing property of the taxpayer which is the standard for determining whether an expense is deductible."[8] Such being the case, it followed that, as the alleged tax was assessed against the income produced by the property and the expense had been incurred as a direct consequence of preventing an assessment against that property, the mere fact that the liability for the tax was a personal one was not enough to make the expense item non-deductible. By so holding, the court appears to have established the rule that, even though an expense be incurred to defend against a personal liabilty, if the attempt to impose that liability is directed against income-producing property, particularly if it proves to be unsuccessful, the expense would not be a "personal" one but would be tax deductible under Section 23(a)(2).

Prior to 1942, the year in which Section 23(a)(2) was enacted, non-business expenses were not deductible although the income from such sources was fully taxable. The injustice of this position, as revealed in a series of cases which reached the United States Supreme Court,[9] induced Congress to pass the section mentioned in aid of those whose non-trade or non-business economic activities produced an income but whose expenses in relation to such activities could not properly be termed business expenses.[10] Since then, it has been the theory of the statute that one should be taxed only on net income and that expenses incurred in the production of income or arising from income-producing property should be deductible.[11]

Probably the leading case affording interpretation of Section 23(a)(2) insofar as the same is here involved is that of *Trustees of Bingham* v. *Com-*

[6] Ibid., § 24(a)(1), in part, reads: "In computing net income no deduction shall in any case be allowed in respect of (1) personal, living, or family expenses."

[7] The pertinent text thereof is set forth in note 3, ante.

[8] 211 F. (2d) 251 at 253.

[9] See Higgins v. Commissioner, 312 U. S. 212, 61 S. Ct. 475, 85 L. Ed. 783 (1941), to the effect that the cost of mangaging a taxpayer's securities was not a trade or business expense. Deduction of a trustee's fee from gross income was denied in City Bank Farmers Trust Co. v. Helvering, 313 U. S. 121, 61 S. Ct. 896, 85 L. Ed. 1227 (1941), on the theory the trust was an investment rather than a business. See also United States v. Pyne, 313 U. S. 127, 61 S. Ct. 893, 85 L. Ed. 1231 (1941), as to office expenses and executor's fees in the management and administration of an estate.

[10] Business expenses are covered by 26 U. S. C. A. § 23(a)(1).

[11] See H. R. Rep. No. 2333, 77th Cong., 2d Sess. (1942). See also Brodsky and McKibbin, "Deduction of Non-Trade or Non-Business Expenses," 2 Tax L. Rev. 39 (1946), and Nahstoll, "Non-Trade and Non-Business Expenses Deductions: Section 23(a)(2) of Internal Revenue Code," 46 Mich. L. Rev. 1015 (1948).

missioner of Internal Revenue[12] wherein the court held that legal fees incurred by a trustee in unsuccessfully contesting an income tax deficiency assessed against the trust, expenses for legal advice in connection with the payment of a cash legacy, and legal expenses arising out of final distribution were all deductible. Construing the section in question to be *in pari materia* with the preceding section relating to the deduction of those expenses which are directly connected with or proximately result from the conduct of a business, the court there indicated that the same standard should be applied to non-trade or non-business income items, a standard which is now popularly referred to as the "proximate relation" test. It must be noted, however, that in *Commissioner* v. *Heide*[13] and in *Commissioner* v. *Josephs*[14] this test was not applied. The facts in both cases were similar in that, in each case, a non-professional fiduciary had settled a claim based on the idea that he had been negligent in the discharge of his duties and sought to deduct the cost of that settlement from his gross income. Admitting that the expense was incurred in connection with income-producing property, the courts concerned nevertheless held the expense was not needed for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.[15] If these courts had carefully read the Bingham case and had given notice to the fact that expenses involved in defending suits charging mismanagement by professional fiduciaries had been held deductible as business expenses, even in cases where negligence or fraud had been proved,[16] they would probably have reached a contrary result for it would seem proper to treat professional and non-professional fiduciaries alike.[17]

An argument has been made, based upon the cases of *Cobb* v. *Commissioner*[18] and *Lykes* v. *United States*,[19] that a claimed deduction for

12 325 U. S. 365, 65 S. Ct. 1232, 89 L. Ed. 1670 (1945).

13 165 F. (2d) 699 (1947).

14 168 F. (2d) 233 (1948), noted in 97 U. of Pa. L. Rev. 251 and 1949 Ill. L. Forum 160.

15 In Commissioner v. Heide, 165 F. (2d) 699 (1947), the court indicated that if negligence had not been proved the expense for legal fees would have been deductible, but said the settlement was prima facie proof of negligence.

16 Kornhauser v. United States, 276 U. S. 145, 48 S. Ct. 219, 72 L. Ed. 505 (1928); Anderson v. Commissioner, 81 F. (2d) 457 (1936); Helvering v. Hampton, 79 F. (2d) 358 (1935); Central Trust Co. v. Burnet, 45 F. (2d) 922 (1930).

17 The author of an unsigned note in 58 Yale L. Rev. 781, at page 786, states: "There is no public policy which forbids deduction of mismanagement expenses. Fiduciary negligence would not be encouraged; few fiduciaries would be delinquent solely because, if sued and held liable, they could get a tax deduction partially offsetting their loss. Even if there were a temptation, it would not justify different treatment for casual as opposed to professional fiduciaries."

18 173 F. (2d) 711 (1949), noted in 63 Harv. L. Rev. 357 and 18 U. Cin. L. Rev. 350.

19 343 U. S. 118, 72 S. Ct. 585, 89 L. Ed. 791 (1952), noted in 5 Vanderbilt L. Rev. 847 and 20 U. of Chi. L. Rev. 247.

amounts paid out for attorneys' fees, except when clearly in the category of business expense, would be improper. In those cases, however, donors had made gifts and gift tax deficiencies were thereafter assessed. When the donors attempted to deduct attorneys' fees incurred in connection with litigating the tax assessments, treating the same as non-business expenses involved in the conservation of income-producing property, it was possible for the courts to say that these expenditures were non-deductible because the liability arose from the transfer of property as a gift, an activity not leading to the production or collection of income or to the management, conservation, or maintenance of property held for the production of income but one well calculated to produce the direct opposite. These holdings, then, can be said to do very little to limit the "proximate relation" doctrine other than to point out that it is not applicable to gift transactions.

Much the same argument was raised in the case of *Baer* v. *Commissioner*,[20] one wherein the taxpayer, involved in a divorce suit, had employed the services of counsel not with respect to the divorce proceedings proper but only in the working out of an alimony settlement, payable in installments over a long period of time, so as to prevent the lessening of the taxpayer's stockholdings, which fact would not only have produced a reduction in his income but would also have deprived him of control of a corporation. The court, nevertheless, held that the attorney's fees were a deductible item under Section 23(a)(2), being incurred in relation to the conservation of property held for the production of income and not simply one involving a personal expense. The taxpayer, apparently, had not paid the legal fees to prevent or lessen his liability to his wife but, rather, had expended the money to arrange a method for the adjustment of that liability under which his stock, retention of which was essential in order to enable him to receive an income, would not be taken to satisfy that liability. If anything, the case expands rather than confines the "proximate relation" test for the original cause of the expense was not attributable to any income-producing property so much as it was to the taxpayer's wrongful acts toward his wife.

Closely analogous to the holding in the instant case is the decision in *Allen* v. *Selig*.[21] A wife had there successfully sued to exclude from her husband's estate, for federal estate tax purposes, certain property which had been purchased by him with their joint savings but the title to which had been taken in his name. She was held entitled to deduct the expense of such litigation, under Section 23(a)(2), on the rationale that the suit so instituted was one designed to conserve income-producing prop-

[20] 196 F. (2d) 646 (1952).

[21] 200 F. (2d) 487 (1952), noted in 2 J. Public Law 215.

erty which she owned from the assertion of an estate tax lien on the same. The legal fees there incurred were proximately related to the conservation of property without which the income would have suffered a reduction.

After giving consideration to the intent which Congress possessed at the time it enacted the statute in question and all applicable and analogous cases, it should be reasonably apparent that it would have been unjust and inequitable if the court had reached any other decision in the instant case than the one it did achieve. Not only did the litigation arise directly because of the existence of income-producing property, that is the corpus of the trust, but it was necessary for the taxpayer to spend money to protect that property from being illegally assessed. It is difficult to see how any other expense could have been more "proximately related" to the conservation of income-producing property than the one in question. The fact that the government was there attempting to obtain a personal judgment against the taxpayer should not serve to alter the situation and if, by forcing the issue, the government suffered a loss of tax revenue, one could appropriately remark that it deserved to lose the same.

H. JOSTOCK

PARENT AND CHILD—SUPPORT OF PARENT BY CHILD—WHETHER OR NOT, IN ABSENCE OF CONTRACT, ONE ADULT CHILD MAY SECURE CONTRIBUTION FROM ANOTHER FOR SUPPORT AND MAINTENANCE FURNISHED AN INDIGENT PARENT—An unusual issue of Illinois law was recently generated in the case of *Shaver* v. *Brierton*[1] wherein the plaintiff, relying on an alleged implied in law contract, commenced an action against her brother before a justice of the peace seeking contribution for money expended in the support and maintenance of their indigent mother. On appeal to an appropriate circuit court,[2] the matter was heard on trial *de novo* before a jury and a verdict was reached in plaintiff's favor, on which verdict judgment was pronounced. On further appeal, the Appellate Court for the Second District, while agreeing with the defendant's contention that, in the absence of contract or statute, no reciprocal duty would be owed among adult children to contribute to the support of their parents, affirmed the judgment on the basis that a statute which admittedly imposed a qualified duty on adult children to support their indigent parents[3] constituted a sufficient statutory mandate to render the non-supporting child liable by way of contribution to the supporting child.

1 1 Ill. App. (2d) 192, 117 N. E. (2d) 298 (1954).
2 Ill. Rev. Stat. 1953, Vol. 1, Ch. 79, § 116.
3 Ibid., Ch. 23, § 439—2.

It is clear that, at common law, a child was under no legal duty to support his parents,[4] even though they might have owed a duty to support the child prior to emancipation, and there was at least a dictum in Illinois cases of *People* v. *Hill*[5] to the effect that no legal duty existed despite the fact the parents were aged, infirm, or destitute. As the older portion of the population has increased, however, most states have found it necessary to enact legislation providing for the care and maintenance of those in this class who might be unable, because of infirmity, illness, or the like, to care for themselves.[6] In the main, legislation of this character has been directed toward the providing of public assistance but, to conserve the public treasury, procedures have been outlined whereby some public official, usually a county officer, may commence legal action against certain named relatives of the supported person to the end that the state might be reimbursed for the money so expended.[7] While the majority of these statutes are similar in character, courts have experienced difficulty in determining the extent of the duty placed upon the indigent person's relatives, particularly with respect to the point as to whether the legislature intended to benefit the indigent person or whether it designed merely to protect the public purse.

Illustrating one view is the New York case entitled *Anonymous* v. *Anonymous*[8] wherein it was declared that the primary, in fact the essential, objective of the New York statute[9] was to relieve the state of a growing financial burden by placing it where the legislature deemed it to belong. Nevertheless, since the legal obligation was statutory only, the court would not extend the child's liability beyond the terms of the statute creating it[10] and the statutory provisions for enforcement were held to be exclusive.[11] This view was followed in the West Virginia case of *Con-*

4 Rex v. Munden, 1 Strange 190, 93 Eng. Rep. 465 (1719); Duffy v. Yordi, 149 Cal. 140, 84 P. 838, 4 L. R. A. (N. S.) 1159 (1906).

5 163 Ill. 186, 46 N. E. 796, 36 L. R. A. 634 (1896).

6 See, in general, Vernier, American Family Laws, Vol. 4, § 235.

7 The right to secure reimbursement from the supported person, if he should later become able to repay, has been specifically preserved by statute: Ill. Rev. Stat. 1953, Vol. 1, Ch. 23, § 440—4 and § 443—18. For an analogous case with respect to the right of the state to charge the mentally incompetent person for the care provided, see Kough v. Hoehler, 413 Ill. 409, 109 N. E. (2d) 177 (1952).

8 176 Misc. 103, 26 N. Y. S. (2d) 597 (1941). The action was one by a mother against her son to compel the son to provide support.

9 New York Public Welfare Law, § 125. It should be noted that this section is substantially identical with New York Code of Criminal Procedure, § 914.

10 Harrigan v. Cahill, 100 Misc. 48, 164 N. Y. S. 1005 (1917); Herendeen v. DeWitt, 49 Hun. 53, 1 N. Y. S. 467 (1888).

11 Matter of Salm's Guardianship, 171 Misc. 367, 12 N. Y. S. (2d) 678 (1939), affirmed in 258 App. Div. 875, 16 N. Y. S. (2d) 1021 (1939). Except for the fact the Illinois statute differs slightly in that it expressly provides that anyone may bring the statutory action on behalf of the indigent parent to compel support by

nell v. *Connell*[12] which, like the instant case, was one by a son against another son for contribution. The plaintiff there contended that the West Virginia statute operated to create a duty sufficient to render the non-supporting son liable but the court, rejecting this contention, pointed to the fact that the statutory provision was part of a chapter relating to the state Department of Public Assistance and, as the case did not concern the allowance of public assistance, was inapplicable. It did say, however, that the court's attention had "not been directed to a statutory provision which would justify a recovery of advances made to support parents by one son against another,"[13] so it would seem that a provision enabling the state to secure reimbursement or to save it from being forced to expend public funds would not, of its own weight, confer a right on one child to recover money voluntarily expended from another even though the latter may be equally liable to the state.[14]

Two leading cases may serve to illustrate the contrary view. In the first of them, that of *Howie* v. *Gangloff*,[15] an action was begun by a sister against her two brothers based on a Minnesota statute[16] which purported to make children liable for the support of their parents. The court, pointing to the fact that the rights of one claiming public support were not in question, nevertheless construed the statute to be intended for the benefit of the indigent person and not solely for the benefit of the state but did call attention to another issue which would seem to be important, that is one child may not voluntarily furnish support to the parent without first notifying the other children that he will expect contribution if he is to recover from them. The second case, that of *Wood* v. *Wheat*,[17] involved similar issues but with the added fact that the Kentucky statute[18] provided for punishment for neglect of the duty to support.[19] The court construed the act to be for the benefit of the indigent person, hence

the child, it would seem to be comparable to the New York provision in its silence as to the person, other than the public agency which has provided support, to be benefited by the action.

[12] 131 W. Va. 209, 46 S. E. (2d) 724 (1948).

[13] 131 W. Va. 209 at 215, 46 S. E. (2d) 724 at 727.

[14] If the state has forced one child to pay the full charge, there might be room for restitution on the theory the plaintiff was compelled to confer a benefit, rather than did so voluntarily, in relieving the defendant of his statutory obligation.

[15] 165 Minn. 346, 206 N. W. 441, 98 A. L. R. 876 (1925).

[16] Minn. Gen. Stat. 1923, § 3151.

[17] 226 Ky. 762, 11 S. W. (2d) 916 (1928).

[18] Ky. Rev. Code, § 331f.

[19] An Ohio court has refused to enforce civil liability against a non-supporting child where the only statute involved contained criminal sanctions: Gardner v. Hines, 68 N. E. (2d) 397 (Ohio Com. Pleas, 1946). As to local enforcement of a foreign statute relating to support, compare Commonwealth v. Mong, 160 Ohio St. 455, 117 N. E. (2d) 32 (1954), with Commonwealth ex rel. Shaffer v. Shaffer, 175 Pa. Super. 100, 103 A. (2d) 430 (1954).

was willing to construe the pertinent sections liberally,[20] but denied recovery because the plaintiff had not notified the defendants that support was being given to the mother.[21] Admitted that one should not be permitted to erect a quasi-contractual obligation as an afterthought upon a gratuity conferred,[22] the fuss the court there raised over the matter of notice stands in sharp contrast to the extremely liberal construction given to the statute.

The decision in the instant case makes no mention of the need for notice since the plaintiff there concerned had made repeated exhortations to her brother to contribute and had clearly evidenced an intention to act in other than a voluntary and donative fashion. The case would, however, seem to be remarkable in that the court, extending the statute beyond its apparent scope, may have opened the door to the creation of civil liability on the part of a child to third persons, other than the state and close relatives, who may have supplied aid to the indigent parent.[23] If the decision should stand, one who has shirked what is everywhere regarded as at least a moral duty may learn that, thanks to judicial construction of the statute in question, he has also become derelict in a legal duty. Illinois will then be joined with those jurisdictions which have not only worried about the state of the public purse but have expressed concern for the honest citizen who has accepted and discharged those duties placed upon him by both the moral and the civil law.

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20 The Kentucky law is discussed in Griffin, "Civil Liability of Child to Support Indigent Parent in Kentucky," 39 Ky. L. J. 451 (1950).

21 The court, 226 Ky. 762 at 766, 11 S. W. (2d) 916 at 918, said: "But in order that one child may impose upon the others the burden of contribution, notice should be given in order that all the children may have equal opportunity to provide the service and supply the needs of the indigent parent. If one child supports a dependent parent, that fact relieves all the children from liability to prosecution under the statute, but when that child expects to hold the others liable to him for contribution, he should give them notice and afford them an equal opportunity to perform the duty for pay, or to make a contribution for the purpose. It may be that the other children acquiesced in the support that was being given in the belief that it was without desire or expectation of compensation."

22 Clary v. Clary, 93 Me. 220, 44 A. 921 (1899).

23 A discussion of the right of a third person to sue a non-supporting child to recover money expended in the support of the parent may be found in the case of Bismarck Hospital and Deaconess Home v. Harris, 68 N. D. 374, 280 N. W. 423, 116 A. L. R. 1274 (1938).