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Recent Case Notes

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RECENT CASE NOTES

Conflict of Laws — Workmen's Compensation — Full Faith and Credit

Plaintiff, a resident of Missouri, was hired in Missouri, by one Hogan, a Missouri employer, to do work in Arkansas in pursuance of a subcontract held by Hogan and let by Lanza, the prime contractor, who was neither a resident of Missouri nor of Arkansas. The plaintiff, Carrol, was injured while working in Arkansas, and subsequently Hogan's insurer voluntarily began to pay workmen's compensation to Carrol pursuant to Missouri law. The Missouri Workmen's Compensation Act contains an extra-territorial provision and provides that the remedies set forth in the act are to be exclusive of all other remedies. While receiving these payments, Carrol sued Lanza in Arkansas in a common law tort action. *Held:* The full faith and credit clause of the United States Constitution does not require that Arkansas' courts bar Carrol's recovery in recognition of the Missouri statute. *Carrol v. Lanza,* 349 U.S. 870 (1955).

In cases such as the principal case, where the employee is hired in his home state to work in another state where he is injured, and he seeks to recover in the state of the injury although the state of his residence provides relief through its workmen's compensation laws, the courts have distinguished certain systematized fact situations. The first such situation is where there has been a recovery by final award under the workmen's compensation act in the home state. Here the plaintiff's cause of action is deemed to be merged in the judgment, and it is held that no further relief can be obtained anywhere. *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943). The second instance is where the workmen's compensation act of the home state purports to provide the exclusive remedy for injuries occurring either within or without the boundaries of the state, and the employee has received payments under this act, but without any adjudication. Here the Supreme Court has held, where a common law tort action was brought in the state where the injury occurred, that the full faith and credit clause of the United States Constitution requires that state to give effect to the home state's act and remit the employee to the proper forum to seek his remedy. *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932). The third situation is where the workmen's compensation statutes of both the home state and the state of the forum purport to provide the exclusive remedy, and the employee seeks recovery under such statutes in the state of the injury. Here the court has held that the state where the injury occurs can provide its own remedy, the "exclusive remedy" provision of the home state's act notwithstanding. *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939). Conversly, where suit is brought in the home state it need not give effect to the act of the state where the injury occurred. *Alaska Packers v. Industrial Accident Commission*, 244 U.S. 532 (1935).

In the *Clapper* case where the employee and employer resided in Vermont and had a Vermont contract of employment, but was injured while working in New Hampshire, the court spoke in terms of which state has the paramount interests to protect. In determining this the court looked to the policy of the two states on these matters and concluded that Vermont had the paramount interest. This interest was evidenced by the policy of the state as set out in its act. The court also took into account interests that were evidenced by the fact that the employee was working under a Vermont contract of employment, all his relatives lived in Vermont, etc.

These "other interests" became more important in the language of the court in the *Pacific Employers* case and the *Alaska Packers* case. When the court looked to the acts of the two states here, it found both had the "exclusive remedy" provision. Interest, then, determined by the state's policy on the matter as set out in the acts of the two states, was exactly equal. Therefore the court allowed these "other interests" to determine which state had paramount interest, and held that the state where the injury occurred, as in the *Pacific Employers* case, need not give effect to the home state's act, since the state of the forum had interests of its own to protect.

In the principle case the Supreme Court held that Arkansas can open her courts to the plaintiff and allow him his common law remedy notwithstanding the Missouri Act providing the exclusive remedy. The court again sought to determine which state had the paramount interest. However, a contrary holding would not have been against any affirmative policy of the state of Arkansas, because in this instance Arkansas did not even purport to provide the exclusive remedy as to this particular prime contractor. He was merely a negligent third party as far as Arkansas was concerned. Also the plaintiff here received no treatment in Arkansas and had no relatives there. The court further gave no weight to the attempted distinction between this case and the *Pacific Employers* case to the effect that in this case Arkansas was not even enforcing rights provided for by her Compensation Act but was instead allowing recovery in a common law tort action. The court dismissed the argument by saying that no such distinction was practical. The dissent in the principal case placed considerable weight on the Congressional change in 28 U.S.C. § 1738 (1948). Prior to the change the section read "And the said records and judicial proceedings..." In 1948 it was changed to read "*Such acts,* records and Judicial proceedings shall have the same full faith and credit . . ." The change would tend to show that the leglislative intent is in favor of each state upholding the other's Compensation Act.

The decision seems to be a continuation of the current trend to to give every benefit possible to the employee. It apparently overrules the *Clapper* case, since the two are in direct conflict, although the court clouds the question considerably by expressly referring to the *Clapper* case and denying any intent to overrule it. The principal case would also seem to add to the *Pacific Employers* case in that now, no matter what the interests of the state where the injury occurs are, that state can apparently apply its own law if it so desires, the full faith and credit clause to the contrary notwithstanding.

Oscar Fields.

COPYRIGHT LAW — FAIR USE — PARODY

Defendant, Jack Benny, produced on television, a fifteen-minute skit entitled "Autolight," a burlesque of the plantiff's copyrighted motion picture "Gaslight." The plaintiff sought to enjoin the defendant from further use of "Autolight," alleging that it was a substantial taking of "Gaslight" material which constituted a copyright infringement. The defendant acknowledged that it was a substantial taking, but contended that since the taking was by burlesque it was a fair use, and therefore was not an infringement. *Held:* The taking is not a fair use, and thus is an infringement of the copyright. *Loew's Inc. v. Columbia Broadcasting System*, 131 F. Supp. 165 (S.D. Cal. 1955).

The courts have never directly considered whether a burlesque treatment of copyrighted material, substantially taken, constitutes fair use; therefore substantiation of the decision in the principal case must be drawn largely by reference to history and statute.

Copyright law in the United States is wholly statutory, *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), based on Art. 1, Sec. 8, cl. 8, United States Constitution, which grants to Congress the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries." The federal copyright act purports to give a person complying with the statute an "exclusive right" in his work. This right extends to "any manner or method" of using his work. 35 Stat. 1075 (1909), 17 U.S.C. Sec. 1 (1952).

The statute does not limit the privilege given to the owner. However, in view of the constitutional intention "to promote the progress of science and useful arts," the courts determined to impose a restriction on the privilege, reasoning that unless more freedom were allowed in the use of existing works that progress would in fact be hindered because authors would be limited or deprived in the use of one of their most prolific sources of ideas. The problem was that of insuring reasonable protection to the copyright holder's interest and at the same time attempting to limit his ownership rights in favor of society.

In an attempt to impose such a limitation, the courts arrived at the doctrine of fair use which is now universally recognized. *Farmer v. Calvert Lithographing Co.*, 8 Fed. Cas. No. 4651, at 803 (C.C.E.D. Mich. 1872). Fair use is the right of limited use of the copyrighted material by someone other than the copyright holder. *Tovsvig v. Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950). The basis for the doctrine of fair use was as a matter of statutory interpretation, but the courts could have further justified the doctrine by analogy to property rights which are qualified by the public interest. For example, at one time ownership of real property was considered absolute, and the landowner owed no duty to his neighbors of reasonable use of his land. But the absolute right became qualified so that a duty was owed as exemplified by the law of nuisance. The qualifications are imposed as a matter of public policy just as the doctrine of fair use is imposed in the interests of society.

A single rule governing the application of the doctrine of fair use cannot be formulated. Cohen, *Fair Use in the Law of Copyright,* A.S.C.A.P. COPYRIGHT LAW SYMPOSIUM, 53, (1955). Of the several rules governing fair use, the rule of substantial taking offers the best guide in adjudging infringement, because the amount of the material taken from the copyrighted work is readily discernible. As a general rule, a substantial appropriation of copyrighted material constitutes an infringement. *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947). However, there is an exception to this rule where the appropriation is for reasonable criticism. *Henry Holt and Co. v. Liggett and Meyers Tobacco Corp.*, 23 F. Supp. 302 (E.D. Pa. 1938).

The defendant in the principal case sought to have parody treated as another exception to the general rule that a substantial appropriation is not a fair use. However, parodies, like other appropriations, involve the taking of phrases and sequences of ideas. Since the mood of parody in which the material is used does not separate the material from its source, the taking of a copyrighted material for a parody should be subject to the same rules of infringement as any other appropriation. Such seems to have been the opinion of the courts in the four cases that have involved parodies. *Hill v. Whalen & Martell, Inc.*, 220 Fed. 359 (D.C. N.Y. 1914); *Bloom & Hamlin v. Nixon,* 125 Fed. 977 (C.C.E.D. Penn. 1903); *Green v. Minzensheimer*, 177 Fed. 286 (C.C.N.Y. 1909); *Green v. Luby*, 177 Fed. 287 (C.C.N.Y. 1909).

Thus when a question of an infringement is involved, it is necessary to abide by the present substantial taking rule to decide whether the taking is for the purpose of disseminating science and useful arts through criticism. As satire and parody have been used extensively as methods of criticism, a possibility exists that parody might be written solely for that purpose and would then be considered within the scope of the present exception to the general rule. To determine the purpose of the parody the courts seem to apply a subjective test to the intent of the writer. When the test reaveals good faith and a striving toward the application of art, the courts broaden their conception of the fair use doctrine. Conversely, when the test reveals bad faith or elements wholly commercial, the courts narrow their conception of the doctrine. *College Entrance Book Co. v. Amsco Book Co.*, 119 F.2d 874 (2d Cir. 1941); *Harms v. Cohen*, 279 Fed. 276 (D.C. Pa. 1922); *Savage v. Hoffman*, 159 Fed. 584 (2d Cir. 1908); Spring, RISKS AND RIGHTS IN COPYRIGHT, 186 (1952).

It would seem that another exception to the substantial taking rule would muddy the waters around the most helpful guide the courts have. Thus it is submitted that the courts will adhere to the present rule, but in its application will attempt to do justice by either (1) emphasizing the commercial motive in the particular case thereby narrowing fair use, or (2) deemphasizing that element and adopting a broader definition of "criticism" so as to cover good faith attempts at artful application. In essence then, substantial use may become a pragmatic test striking a balance between the right of the author to use the product of his intellect, and the right of the public to the dissemination of knowledge and the promotion and progress of science and useful arts which is the constitutional mandate by which the American law of copyright originated. Yankwich, *What is Fair Use*, 22 U. CHI. L. REV. 412.

Arthur C. Flinders.

CORPORATIONS — DIRECTORS — PERSONAL LIABILITY TO THIRD PERSONS

Defendants, directors of a Texas corporation, passed a resolution empowering the president to borrow a sum of money and to issue promissory notes. The notes were to provide for payments out of the "first proceeds of any funds received by the corporation as a result of the public offer of its stock." The notes were duly executed, but the proceeds of the stock sale were used to pay other creditors and for other corporate purposes. Payees sued the directors of the now-insolvent corporation on two of the notes, although there were no allegations of fraud or misappropriation. *Held:* The provision for payment out of the stock proceeds created an equitable lien on said proceeds, and the directors are personally liable for the corporation's failure to pay the notes with the proceeds. *Emmert v. Drake,* 224 F.2d 299 (5th Cir. 1955).

Directors of a corporation may expressly bind themselves to pay the debts of the corporation, and such agreements obviously lead to personal liability. *Kessel v. Murray,* 197 Iowa 17, 196 N.W. 591 (1924). But the general rule, in the absence of some statutory liability, is that directors are not personally liable to third persons for corporate debts, or for breach of contracts the corporation may lawfully have entered. *Snyder v. Wiley,* 59 Tex. 448 (1883); *Connally v. Lyons,* 82 Tex. 670, 18 S.W. 799 (1891); Fletcher, 3 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 825 (1947).

The court in the principal case has seen fit to depart from this rule, and does so by finding an equitable lien. To sustain such finding the court cites *Simpson v. Amarillo Mut. Benev. Ass'n,* 68 S.W.2d 597 (Tex. Civ. App. 1924), where a court order to pay from a specific fund created an equitable lien on the fund. In the absence of a court order, there is substantial authority to indicate that a mere promise to pay a debt from a certain fund will not create an equitable lien. *Patterson v. Citizens Nat. Bank of Lubbock,* 236 S.W. 130 (Tex. Civ. App. 1922); *Lone Star Cement Corp. v. Swartwaut,* 93 F.2d 767 (4th Cir. 1938); *In re Additional Approach to Triborough Bridge,* 12 N.Y.S. 884, 257 App. Div. 267 (1939). However, if the promise can be interpreted as manifesting an intention to make the fund *security* for the debt, the lien is clearly established. *Atlanta Nat. Bank v. Four States Grocer Co.,* 135 S.W. 1135 (Tex. Civ. App. 1911), *error refused; First Nat. Bank of Chicago v. Southwestern Lumber Co. of New Jersey,* 75 F. 2d 814 (5th Cir. 1935); *Kennedy v. State Industrial Commission,* 180 Okla. 514, 72 P. 2d 362 (1937). One Texas case found the promise alone sufficient manifestation to create the lien. *Gardner v. Planters' Nat. Bank of Honey Grove*, 118 S.W. 1146 (Tex. Civ. App. 1909), *error refused.* However, even if the existence of the lien in the principal case is conceded, it is nevertheless difficult to discover how such lien made the *directors* personally liable since a lien only has the effect of encumbering certain property and not of charging the persons liable for the debt secured by the lien.

In the application of tort principles to corporation law, it is well-established that directors owe a duty of ordinary care to the corporation in the management of corporate affairs. *Green v. Hall*, 228 S.W. 183 (Tex. Comm. App. 1921). Yet in the principal case no corporate cause of action was involved, as third persons were suing the directors. Some courts have denied the existence of a duty running from the directors to those who engage in transactions with the corporation, particularly where there is no deceit or other fraud. *Zinn v. Mendel*, 9 W. Va. 580 (1876); *Hart v. Hanson*, 14 N.D. 570, 105 N.W. 942 (1905). Fear is frequently expressed that such liability would interfere with the freedom of business discretion which is essential to corporate management.

When the corporation becomes insolvent the fiduciary duty of directors toward the corporation has often been extended to creditors, and directors are referred to as "trustees" for the creditors of the insolvent corporation. *Pepper v. Litton*, 308 U.S. 295 (1938). Some courts have held that the duty arises before actual steps have been taken to wind up the corporate affairs. *Bird v. Magowan*, 58 N.J.E. 180, 43 Atl. 278 (1898). The Texas decisions hold, however, that a corporation is not insolvent without some positive act of insolvency, such as the making of a general assignment for creditors. Until then, the fiduciary relation ". . . is in favor of the corporation alone." *Conway v. Bonner*, 100 F. 2d 786 (5th Cir. 1939), *certiorari denied* 307 U.S. 632 (1939). No evidence of such "positive act" is indicated in the principal case, so liability must rest on other principles.

Texas courts, apparently following the weight of American authority, have on occasion found directors liable to third parties in the absence of insolvency, ". . . but the rule as to such liability is largely relative." *McCollom v. Dollar*, 213 S.W. 259 (Tex. Comm. App. 1919). Fraudulent misrepresentations of the corporation's solvency has been held to place personal liability on the directors when they knew of the falsity, or should have known in the exercise of their official duties. *Kinkler v. Jurica,* 84 Tex. 116, 19 S.W. 359 (1892); *Durham v. Wichita Mill & Elevator Co.,* 202 S.W.2d 138 (Tex. Civ. App. 1918), *error refused.* Liability has been extended to participation in or sanctioning of conversion of corporate stock, *Bower v. Yellow Cab Co.,* 13 S.W. 2d 708 (Tex. Civ. App. 1929) *error refused;* and knowingly mingling funds collected for and belonging to another with funds of the corporation. *McCollom v. Dollar, supra.*

Limitations on the director's personal liability, however, have often been emphasized. When injury to a third person has been caused by acts of subordinates unknown to the directors, or by conduct of the directors in the exercise of due care, a cause of action against the directors is not allowed. *Economy Filling Stn. v. Humble Oil & Refining Co.,* 3 S.W.2d 832 (Tex. Civ. App. 1928), *error dism.; Peter v. First Nat. Bank,* 92 S.W.2d 1079 (Tex. Civ. App. 1936). In other words, liability does not exist by virtue of the corporation-director relationship in and of itself.

If the directors are negligent, there is some authority to indicate that mere mismanagement will not create liability if the board has acted in good faith. *Cameron v. First Nat. Bank of Galveston,* 194 S.W. 469 (Tex. Civ. App. 1917) *error refused;* 2 THOMPSON ON CORPORATIONS, *supra,* 951. See annotation of cases 50 A.L.R. 462. On the other hand, some opinions have held that negligence will give creditors a cause of action against the directors. *McCollom v. Dollar, supra.* On agency principles, the distinction between misfeasance and nonfeasance has occasionally been held to control, with liability for the latter existing only to the corporation. *Conrick v. Houston Civic Opera Ass'n,* 99 S.W.2d 382 (Tex. Civ. App. 1936).

It is submitted that the holding in the principal case is rather difficult to reconcile with Texas authority. The court, at the outset of the opinion, excluded any issue of fraud or misappropriation, the sources of liability in a large number of earlier cases. There was no direct evidence of negligence, and even assuming a duty of ordinary care owing to the payees—an assumption far from certain—can we be sure that the use made of the proceeds was not in the best interests of a failing corporation? Such a question would seem to be significant in view of the duty from director to corporation.

William D. Powell, Jr.

CORPORATIONS — INSPECTION OF BOOKS AND RECORDS BY AN EX-DIRECTOR

The director of a corporation, who was not a stockholder, brought a proceeding in the nature of mandamus to compel the corporation to permit him to inspect its books and records. The director suspected mismanagement and misappropriation of corporate funds by an officer and a previous request to inspect had been refused. While the proceeding was pending, a new board of directors was elected and the petitioner was not re-elected to his position as director. *Held:* The discharged director did not have an absolute right, but could have a qualified right, to inspect corporate books and records covering period of directorship if he could show that such inspection was necessary to protect his personal responsibility and interest as well as stockholder's interests. Dissenting, three of the judges were of the opinion that a discharged director has no right whatsoever to inspect the books and records. *Cohen v. Cocoline Products, Inc.*, 309 N.Y. 119, 127 N.E.2d 906 (1955).

Demands made by directors or stockholders to inspect corporate books and records have produced extensive litigation in New York courts. The stockholder has always been granted a qualified right at common law to inspect all books of the corporation, and with respect to the examination of the business books and records of the corporation this rule is followed in New York today. *Schiller v. Flatbush Message Bureau, Inc.*, 108 N.Y.S.2d 828 (Sup. Ct. 1951). The right of the stockholder to inspect the stock book, however, is now expressly given by Sections 10 and 113 of the Stock Corporation Law and differs from the right given by common law in that, *inter alia,* the stockholder is required to have held shares of the corporation for at least six months preceding the demand, or, in the alternative, to represent or hold five per cent of the outstanding shares of the corporation. With regard to the director, the New York decisions have consistently held that he is entitled to an absolute as distinguished from a qualified right to inspect the corporate books and records. This right has been upheld irrespective of motive, the justification being that it is necessary for the proper discharge by the director of his fiduciary duties to the corporate body and its stockholders. *Overland v. Le Roy Foods, Inc.*, 279 App. Div. 876, 110 N.Y.S.2d 578, affirmed mem., 304 N.Y. 573, 107 N.E.2d 74 (1952); *Hafter v. Eagle Fish Co.*, 296 N.Y. 808, 71 N.E.2d 774 (1947) (mem.). Whether this right is as unqualified as the decisions would seem to indicate is possibly open to question, for in *Posen v. United Aircraft Products, Inc.*, 201 Misc. 260, 111 N.Y.S.2d 261 (Sup. Ct. N.Y. County 1952), a director was refused examination because he declined to apply for governmental security clearance as required by law. But inasmuch as this was an extreme case, the law in New York probably remains that the director's motives are immaterial. That the right of absolute inspection is not universally accorded to directors is demonstrated by *State ex rel. Paschall v. Scott*, 41 Wash. 2d 71, 247 P.2d 543 (1952), and *Strassburger v. Philadelphia Record Co.*, 335 Pa. 485, 6 A.2d 922 (1939), these decisions holding in effect that the director must prove his good faith before an inspection will be ordered.

A stockholding director, if voted out of office, would by virtue of his holdings still possess a qualified right to inspect the books and records. In the principal case, however, the director was not a stockholder; hence, after his removal, any claim by him of a right to inspect books and records must necessarily be based on the sole ground that he was once a director. There seems to be little question that a director loses his absolute right of inspection if he is removed from office before or during the proceeding to compel inspection. *Overland v. LeRoy Foods, Inc., supra; Hafter v. Eagle Fish Co., supra.* Neither of these cases considered the possibility of the nonstockholding director retaining a qualified right. In the instant case, the majority of the court reasoned that, notwithstanding his removal, the discharged director should have a qualified right of inspection since there is the possibility that he has incurred some personal liability for what transpired during his term of office. Further, by permitting the ex-director to retain a qualified right of inspection covering the period of his directorship, not only will he be able to protect his personal responsibility but such right could also very well inure to the benefit of the stockholders by a disclosure to them of any derelictions by other directors or officers. The dissent was of the opinion that since the ex-director is neither a director nor a stockholder, he has no rights at all as to inspection, regardless of motive.

The significance of the principal case lies in its decision, without precedent in the field of corporation law, that a nonstockholding director retains a qualified right to inspect the corporation's books and records after termination of his directorship. While admittedly an ex-director may under certain circumstances be held personally liable for acts which transpired during his term of office, it is submitted that such fact alone is weak support for the decision that he retains a qualified right of inspection after he leaves office. If a liability has been incurred while in office, a subsequent inspection of the books and records would contribute nothing toward safeguarding his interests, other than revealing the liability, if previously unknown. Revelation of a prospective liability does not make the ex-director any the less liable. He can do nothing until and unless suit is brought. If suit were brought, sufficient opportunity to inspect should be available by means of discovery procedures and at the pretrial examination. Further, the standard which this decision lays down for the trial court to follow, in exercising its discretion to grant or withhold permission to inspect the books and records, seems too vague. The discharged director is, in legal contemplation, a stranger to the corporation and the present decision seems insupportable.

Wayne Wile.

Corporations — Parent and Subsidiary — Liability of Parent for Debts of Subsidiary

The parent corporation was a co-operative organized under the laws of New York to provide low cost housing to its member-stockholders, most of whom were veterans. A subsidiary was organized to construct the proposed housing, with the parent corporation being the sole owner of the subsidiary's stock and controlling all of the subsidiary's affairs. Building costs running higher than expected, the subsidiary was unable to complete the houses under construction. The subsidiary's creditors, pursuant to an extension agreement, took over the construction of the houses. Four years later the subsidiary went bankrupt. Representing the creditors, the trustee in bankruptcy of the subsidiary brought suit to compel the parent to meet the obligations of its subsidiary. The "outward indicia" of the two corporations had remained separate during the period that the creditors extended credit, and the creditors were not misled. *Held:* the trustee in bankruptcy of the subsidiary corporation can not compel the parent corporation to meet the obligations of its subsidiary where no fraud, misrepresentation, or illegality is involved. *Bartle v. Home Owners Cooperative, Inc.*, 127 N.E.2d 832, (N.Y. 1955), (6-1 decision).

The dissenting opinion pointed out that the stockholders of the parent corporation, by having their homes constructed for them, received something of value by virtue of their ownership of the parent's stock, a benefit analagous to dividends. Under the circumstances, it was contended that the benefit to the stockholders was a benefit to the parent corporation, implying that since the parent corporation was to receive a financial benefit from its subsidiary then it should be held liable for the debts of the subsidiary incurred in connection therewith. It was also considered of prime importance that the subsidiary could not possibly make a profit since it was to sell the homes to the stockholders of the parent at cost. With small capital furnished to the subsidiary by the parent, it was inevitable that the subsidiary would eventually become insolvent in the event of increased building costs.

The law permits the incorporation of a business for the very purpose of escaping personal liability. *Ohio Edison Co. v. Warner Coal Corp.*, 72 Ohio App. 437, 72 N.E. 2d 487 (1946). This is true even where the business to be conducted is recognized as being risky, for this frequently is one of the main reasons for incorporation, and, in the absence of fraud, is a legitimate one. *Almirall & Co. v. McClement*, 202 N.Y.S. 139 (1923). An early English case recognized that even a single businessman may incorporate his business, holding all its stock, and still be afforded limited liability. *Salomon v. Salomon*, [1897] A.C. 22. This general rule remains the same in the analogous situation where the sole stockholder is another corporation. *Gledhill v. Fisher & Co.*, 272 Mich. 353, 262 N.W. 371 (1935).

The law seems to be more willing to "pierce the corporate veil" in tort cases than it does in contract cases. In explanation of the distinction it has been said that a party injured by the act or instrumentality of the subsidiary is an involuntary creditor, and the creditor by contract is a voluntary one. Latty, *Subsidiaries & Affiliated Corporation* 201. It is reasoned that the contract creditor, unless he is fraudulently misled by the failure of the two corporations to outwardly maintain their separate existance, voluntarily risks the financial strength or weakness of the subsidiary corporation with which he deals. But, except in unusual cases, a party whose claim against a subordinate arises out of a tort places no reliance upon the financial stability of the company before its act or instrumentality caused him injury. The majority of these tort cases speak of the subsidiary as the agent of the parent and allow recovery on the theory of respondent superior. *Lehigh Valley R. Co. v. Dupont*, 128 Fed. 840 (2nd Cir. 1904); *Erickson v. Minnesota & Ontario Power Co.*, 134 Minn. 209, 158 N.W. 979 (1916).

In cases where the parent has been held responsible for the contractual liabilities of the subsidiary, the opinions almost always speak of fraud as the reason for disregarding the corporate entity, but when shorn of its irrelevant verbiage, the formula comes down to this: liability will be imposed to avoid an inequitable result. Latty, *op. cit. supra* 198. In the principal case, the court did not think it would be inequitable to refuse to pierce the corporate veil.

However, the particular situation in the instant case suggests the possibility of recovery against the parent on two other theories. The parent corporation was the owner of a residential subdivision, the lots of which were to be sold to the stockholders after the houses had been constructed on them at cost. Presumably this had not taken place at the time of the suit in litigation. The subsidiary corporation might be compared to a building contractor. If the separate existence of the corporations is to be recognized and upheld, it would follow that the builder (the subsidiary corporation) would be entitled to a mechanic's lien for the value, or the agreed price, of the labor and materials furnished in construction. New York Lien Law § 3. But the subsidiary was unable to complete construction. The court says that the creditors took over construction pursuant to an "extension agreement," and presumably completed the houses. It would therefore seem that the creditors also would have a right to a mechanic's lien for the value of the labor and materials furnished by them, in addition to being subrogated to the insolvent subsidiary's lien rights, and that an action to foreclose the lien could prevail against the parent corporation.

It is not clear from the court's opinion whether or not the parent corporation was to pay the subsidiary for the houses it constructed or to merely reduce its equity in the subsidiary (and thus the assets of the subsidiary) by simply receiving the completed homes. The opinion does indicate that the parent furnished, in addition to the initial capital of $25,000, "additional sums amounting to $25,639.38." If this is considered payment for services rendered and material furnished, the argument that the parent still owes the subsidiary for the remainder of the houses is strengthened. If not, the question of distribution of capital to the stockholder corporation may come into play. The capital of the subsidiary was converted into labor and materials composing the houses; the houses, being on the property owned by the parent, became the real property of the parent. The capital furnished by the parent as stockholder, therefore, was returned in the form of houses, thus depleting the assets of the subsidiary. As the debts of the subsidiary became greater than its assets, the continued reduction of its capital was illegal under New York Stock Corporation Law § 53, and the trustee in bankruptcy should be allowed to "follow" this withdrawn capital and look to the stockholder corporation for satisfaction. *Cottrell v. Albany Card and Paper Mfg. Co.*, 142 App. Div. 148, 126 N.Y.S. 1070 (1911).

Robert H. Thomas.

DAMAGES — INSTRUCTIONS TO THE JURY — FEDERAL INCOME TAX

Plaintiff, a railroad empolyee, sued his employer for back and knee injuries incurred while working. The employer requested the court to instruct the jury that any amount received by the plaintiff as compensation for personal injuries would be exempt from federal income tax and that the jury must take that into consideration in arriving at its verdict. *Held:* The trial court did not err in refusing the requested charge, even though Ohio law requires instruction on any point of law pertinent to the verdict. *Maus v. New York, Chicago, & St. Louis RR. Co.*, 128 N.E.2d 166 (Court of Appeals, Ohio, 1955).

The problem presented by this case is relatively new, in that the decisions on the point have virtually all appeared since World War II. The decisions have not reached a harmonious result, even though it is well settled that compensation for personal injuries is tax exempt. The *Internal Revenue Code of 1954*, § 104a, provides that, except as to amounts deducted as medical expense, gross income does not include: "(1) amounts received under workmen's compensation acts as compensation for personal injuries and sickness; (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . . ." The theory behind this tax exemption is that the sums received are merely compensation to make the plaintiff whole again. The amount received does not increase the recipient's wealth, it merely replaces what he has lost, and thus the damage award should not be taxable income to him. Technically it would seem that compensation for loss of wages should be taxable, but where a verdict is general there is on way of determining the amount apportionable to wages, so that the entire verdict in practice is tax-free. *Pfister v. City of Cleveland*, 113 N.E.2d 366 (Court of Appeals, Ohio, 1953).

The jury is entitled to be instructed on the elements to be considered in arriving at the proper amount of damages to compensate the plaintiff for his injuries. These elements include hospital expenses, pain and suffering, mental anguish, time lost from work, loss of earning capacity, humiliation, disfigurement, inconvenience, and physical incapacity. *Gulf C. & S.F. Ry. Co. v. Greenlee*, 62 Tex. 344 (1884); *Southwestern Bell Tel. Co. v. Ferris*, 82 S.W.2d 229 (Tex. Civ. App. 1935, error dism.) As the damage award is to be merely compensation for the loss sustained, the jury has no right to consider matters which have no bearing on compensation, such as how the defendant acquired the money to be used to pay the judgment or how the plaintiff will use it. *Wilmoth v. Limestone Products Co.*, 255 S.W.2d 532 (Tex. Civ. App. 1953, Ref.n.r.e.). Since the jury is not to consider whether or not the plaintiff will have to use part of the money to pay the tax, an instruction on tax exemption is not pertinent to the issues involved in the case.

The jury is not entitled to consider the tax exemption, at least in connnection with the future taxes which the plaintiff would have had to pay had he earned the money instead of receiving it as tax-free damages. *Stokes v. U.S.*, 144 F.2d 82 (2d Cir. 1944). However, the courts have split on whether or not the jury is entitled to a cautionary instruction advising them that the award is tax free. The purpose of a cautionary instruction is to prevent the jury from straying outside the limits set up by the evidence in arriving at the proper amount of damages. *Hart v. Kansas City Public Service Co.*, 154 S.W.2d 600 (Mo. App. 1941). The argument in favor of a cautionary instruction on the tax exemption is that it is unfair to the defendant to let the jury speculate as to whether the award is taxable, for that might cause the jury to boost the award on the basis of a misconception. This is a decidedly minority view, and it is supported mainly by the case of *Dempsey v. Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952), which was followed by *Hall v. Chicago & N.W. Ry. Co.*, 110 N.E.2d 654 (Ill. App. Ct. 1953). The majority view is illustrated by the Illinois Supreme Court opinion reversing the above-mentioned *Hall* case, 125 N.E.2d 77 (1954). The court reasoned that, even though the requested instruction was a correct statement of the law, it should not be given, because it was not material to the issues involved in the case. In Texas there is dictum in one case expressly favoring the rule of *Dempsey v. Thompson*, which would permit a cautionary instruction on tax exemption at the discretion of the trial court. *Texas & N.O. Ry. Co. v. Pool*, 263 S.W.2d 582 (Tex. Civ. App. 1953). However, there is a more recent case with dictum to the contrary. *Missouri-Kansas-Texas RR. Co. v. McFerrin*, 279 S.W.2d 410 (Tex. Civ. App. 1955, writ of error granted). To say the least, the rule to be followed in Texas is indefinite until the Texas Supreme Court rules on the *McFerrin* case.

The better rule would be to give no instruction at all on the tax exemption, but to merely instruct the jury to follow closely the evidence presented in arriving at the amount of damages. An instruction to the effect that "(1) the jury is to find the present worth of the gross wages that the plaintiff would have earned but for the disabling injury, (2) the jury is not to deduct therefrom any sum which it is thought the plaintiff would have to pay in taxes if he actually earned such gross wages, and (3) the jury is not to add to the amount so found any sum to compensate for supposed reduction of the verdict by taxation," has been suggested by a recent comment in this *Journal.* 8 *SwLJ* 97 (1954). However, even that instruction may be criticized for drawing the jury's attention to questions of taxation and tax-exemption. A cautionary instruction to the effect that the jury in computing the plaintiff's damages should consider only the evidence before it would be unobjectionable, but such instruction might not deter the jury from mistakenly considering the tax aspect of the award on its own initiative. However, it must be assumed that the jury will follow the judge's instructions.

Robert N. Best.

Labor Law — NRLB Elections — Eligibility of Employees to Vote During Strike

There was a strike in progress at a manufacturing plant; an election was held by the NLRB to determine the bargaining agent of the striking employees. When the strikers appeared to vote, the company challenged several on the ground that they had been guilty of strike misconduct, and therefore were not entitled to vote because of Sec. 9 (c) (3) Labor-Management Relations Act of 1947—61 Stat. 144 (1947), 29 U.S.C. Sec. 159 (c) (3) (1952). The company had neither discharged nor replaced them. By counting those challenged for strike misconduct, the NLRB established a bargaining agent with whom the company refused to deal. *Held:* The Labor-Management Relations Act Sec. 9 (c) (3) which states that "Employees on strike who are not entitled to reinstatement shall not be eligible to vote," includes only those whose reinstatement rights have been destroyed by the employer's affirmative act of replacement or discharge. It does not include those gulity of strike misconduct whom the employer could have replaced, but did not. *Union Mfg. Co. v. NLRB,* 221 F.2d 532 (D.C. Cir. 1955), *certiorari denied.*

This was a case of first impression; in the absence of prior decisions, the court looked to the legislative history of the bill. H.R. No. 3020, 80th Cong., 1st Sess. 9 (c) (3) (1947); 93 Cong. Rec. 4999, 5117 (1947) S. Rep. No. 105, 80th Cong., 1st Sess. 25 (1947); THE NEW LABOR LAW, issued by the Bureau of National Affairs, (1947). Mr. Taft, in presenting the Senate majority committee report, discussed this section of the proposed bill narrowly, in relation to an anomolous situation of multiple voting which had arisen under the Wagner Act. Strikers who had been replaced and were no longer entiled to reinstatement, nevertheless had the right to vote to determine the bargaining agent. The multiple voting occurred when these strikers, as well as their replacements, were allowed to vote for the bargaining agent.

The dissent chose to follow the general purpose of the Act, to afford peaceful settlements of disputes, rather than the specific purpose of Sec. 9 (c) (3), to prevent multiple voting, as indicated in the legislative history. However, it would seem that the rule advocated by the dissent would in effect place a penalty on the strikers who, though guilty of strike misconduct, were nevertheless allowed to return to work, by denying them their vote for the bargaining agent.

Prior decisions on the right to reinstatement are numerous. Strikers remain employees while on strike, *NRLB v. Mackay Radio & Telegraph Co.,* 304 U.S. 333 (1932), and are generally entitled to reinstatment, unless guilty of strike misconduct, *NLRB v. Fansteel,* 306 U.S. 204 (1939); this rule is applicable whether the strike is economic, i.e., for wages, hours, and conditions, or for the unfair labor practices of the employer, *NLRB v. American Rolling Mill Co.,* 126 F.2d 38 (6th Cir. 1942). It has been suggested that the unfair labor practices should be investigated to ascertain the nature and degree of provocation, if any, which may have caused the strike misconduct; and, if these unfair labor practices are excessive and provoke the strike misconduct, the guilty employees should be allowed to return to work. 52 Harv. L. Rev. 1326.

Where the strike is economic in nature, as distinguished from a strike provoked by an unfair labor practice, the general right of an employee to reinstatement does not apply if he has been replaced. Conversely, the employer's obligation to reinstate employees on an economic strike extends only to those who have not been replaced during the strike. *NLRB. v. Mackay, supra.* The Act does not interfere with the employer's normal exercise of his right to select employees or to discharge them so long as his action is not discriminatory against collective activity, *NLRB v. Blue Bell-Globe Mfg. Co.,* 120 F.2d 974 (4th Cir. 1941). If the strike is for unfair labor practices, however, the employer, in the absence of strike misconduct, must rehire all of the employees on strike, even if this means discharging employees who have been hired during the strike to take their place, *NLRB v. Remington Rand,* 130 F.2d 919 (2d Cir. 1942).

In firing or refusing to rehire striking employees, the case law prior to the adoption of Labor-Management Relations Act of 1947 required the employer to act, and silence or acquiescence accomplished nothing. The employer must assert that the employee is not entitled to reinstatement because of strike misconduct, or he cannot object to his returning to work under an NLRB order, *NLRB v. Bradford Dyeing Asso.,* 310 U.S. 318 (1940); the employer may waive his rights to fire because of misconduct by allowing the employee to continue his work, *Durr v. Clear Lake Park,* 205 Ia. 229, 218 N.W. 54 (1928); the employer must show the individual guilt of the employee he refuses to reinstate, and not simply that the strikers generally were guilty of misconduct, *NLRB v. Colten,* 105 F.2d 179 (6th Cir. 1939). The employer can readmit some employees who are guilty of misconduct while at the same time refusing to admit others who are equally as guilty, so long as there is no anti-union discrmination, *NLRB v. Fansteel, supra.* These cases clearly show that the guilt of the strikers alone does not terminate their employment, but to effect a discharge the employer must act upon that guilt.

Of course the employer can effectively challenge persons appearing to vote on the ground that they are not employees. It would seem that under the holding in the principal case Sec. 9 (c) (3) simply gives the employer the right to fire prior to the vote for the bargaining agent those strikers guilty of strike misconduct, and thereby terminate their status as employees. Sec. 9 (c) (3) does not affect the ascertainment of those who are or who are not entitled to reinstatement; this problem will be determined before Sec. 9 (c) (3) is invoked. It might be argued that since Sec. 9 (c) (3) is phrased in terms of the *right* to reinstatement and makes no mention of actual *discharge* of the employee, an employee guilty of strike misconduct but not actually discharged has lost his *right* to reinstatement, and therefore is not eligible to vote. However, the decision in the principal case clearly requires affirmative action by an employer if he wishes to avoid the situation of multiple voting. But it is submitted that this decision will probably not and should not otherwise affect the case law on the right to reinstatement.

Neil J. O'Brien.

SALES — AUTOMOBILE DEALERS — ESTOPPEL

Plaintiffs, wholesale car dealers, bring an action to recover cars from defendants who bought them from a retail dealer, relying upon his possession as an indicia of title. The retail dealer had not paid the plaintiffs for the cars and did not have title at the time of the sale to defendants. *Held:* An owner, who allows a known retail seller to have possession of his goods, is estopped from asserting his title against a purchaser from the seller. *Heaston v. Martinez*, ...Utah......, 282 P.2d 833 (1955).

As pointed out by one dissenting judge, at common law in order to hold that an owner had estopped himself from asserting his title against an innocent purchaser of his goods, it was necessary to show that the owner had clothed the fraudulent seller with *indicia of title. Pickering v. Busk,* 15 East 38, 104 Eng. Rep. 758 (King's Bench 1812), (allowing broker to have possession *plus* record title to hemp on wharf created an indicia of title and estopped owner); *Winakur v. Sapoun,* 145 Atl. 342 (Ct. App. Md. 1929), (allowing auto dealer to have possession *plus* record title created indicia). Possession alone was never enough to create the necessary indicia of title, *Wilkerson v. King*, 2 Camp. 335, 170 Eng. Rep. 1175 (Nisi Prius 1809). The Uniform Sales Act, § 23, has confined this common law rule and the courts applying it have followed the common law reasoning, *Shere-Gillett Co. v. Long*, 318 Ill. 432, 149 N.E. 225 (1925).

The court in the principal case applied § 23 of the Uniform Sales Act and reached the opposite result, saying that the plaintiffs estopped themselves by giving a retail dealer possession of the cars without any other indicia of title. This may indicate a new trend in the field of estoppel brought on by the increasing demand for finality in commercial transactions. The trend may be a good one, but the court seems to be overlooking the necessary factor of the buyer's *reasonable reliance* on the seller's possession which is actually the most important element of any estoppel, *Hawkins v. M&J Finance Corp.*, 238 N. C. 174, 77 S.E. 2d 669 (dictum). The court believes that since the Utah Motor Vehicle Code, U.C.A. 41-1-65, does not require dealers to secure certificates of title on their cars, there was nothing to put the buyers on notice that the seller did not have title. It is not, however, necessary that a buyer be put *on notice* of a possible defect before he must investigate his seller's title, but rather that he act reasonably and in good faith, *Nudge v. Supreme Court I.O.F.*, 149 Mich. 467, 112 N.W. 1130 (1907), or that he was without knowledge *and* had no means to determine the facts, *Atkinson v. Plum*, 50 W. Va. 104, 40 S.E. 587 (1901).

The Texas Certificate of Title Act, TEX. PEN. CODE, (1925), Art. 1436-1, is similar to the Utah Motor Vehicle Code, and the Texas Supreme Court has held that it does not require dealers to secure certificates of title for their cars, *Motor Inv. Co. v. Knox City*, 141 Tex. 530, 174 S.W.2d 482 (1943). See also OPINION OF ATTY. GEN. 0-2065-A, 1941. Unlike the Utah courts, however, the Texas courts hold that a buyer from an auto dealer is subject to the act, even though the dealer is exempt, and therefore the buyer must receive a cerificate of title at the time of sale. If he does not, the entire sale will be void as set out in sec. 52 of the act. *Onwiler v. Burtrum*, 236 S.W.2d 157 (Tex. Civ. App. 1950); *Deahl v. Thomas*, 224 S.W. 293 (Tex. Civ. App. 1949) *ref. n.r.e.* It seems unfair to a buyer to force him to demand something the dealer will probably not have, and then say that the sale is void if he does not receive it.

While the court in the principal case seems to go to one extreme in finding an estoppel solely from the fact of possession by the dealer with no investigation by the buyer necessary, the Texas courts seem to have reached the opposite extreme in requiring the buyer to actually receive a certificate of title before there is an estoppel. It is submitted that a better solution to this problem lies between these two views. *Mills v. Clark,* 257 S.W.2d 746 (Tex. Civ. App. 1953) *ref. n.r.e.,* is the only case found which seems to take the more reasonable approach that all a buyer has to do in order to be bona fide is to *make an application* for the certificate of title at the time of the sale instead of actually receiving it.

By correctly using the doctrine of estoppel the courts can balance the equities between a wholesale car dealer who must sell on the trust receipt basis and a retail car buyer who relies, and in some cases reasonably so, on his seller's possession as indicia of title.

Walter W. Steele, Jr.

Torts — Nuisance — Unreasonable Use of Land

In an action for a restraining order and damage arising out of nuisance plaintiffs alleged the following facts: Defendant excavated a pond within 400 feet of plaintiffs' grain fields and placed decoys and bait thereon to attract geese. Defendant was successful in attracting 200 wild geese the first winter, 1,200 the next and 3,000 during the third. These geese foraged upon plaintiffs' grain crops, thereby damaging them to the value of $48 the first year, $105 the second and $1,343 during the third year. Defendant's demurrer, which advocated that there could be no cause of action where plaintiff alleged neither an unlawful nor negligent act upon defendant's part and where the damages were done by animals *ferae naturae,* was sustained by the trial court. *Held:* (one judge dissenting) the complaint stated a cause of action. *Andrews v. Andrews,* ......N.C......., 88 S.E.2d 88 (1955).

The majority opinion is built upon the broad foundation that one must use his property so as not to injure that of another. From this premise a private nuisance is found where the land, property or rights of another are injured by the improper use of one's own land. Though a pond is not a nuisance per se, a private nuisance *per accidens* (in fact) could be shown by reason of its location and the manner in which it is used. They reiterate that negligence is not a necessary element of nuisance, and point out that "most nuisances *per accidens* are redressed without allegation or proof of negligence." The dissent merely points out that defendant can not be held liable for the trespasses of animals *ferae naturae.*

The principle that one must use his property so as not to injure that of another is in sharp conflict with the principles of absolute ownership. Because of the latter doctrine, the former principle is limited to the extent that one is not entirely prohibited from using his property in such a way as to damage his neighbor, *Hoover v. Horton,* 209 S.W.2d 646 (Tex. Civ. App. 1948), and that the use of property is usually limited only to the extent that the property owner is not allowed to infringe upon the legal rights of adjacent owners. *Texas and N.O.R. Co. v. Davis,* 60 S.W.2d 505 (Tex. Civ. App. 1933).

In a number of jurisdictions, including Texas, it is specifically held that there is no imposition of the absolute liability of the *Fletcher v. Rylands* doctrine. *Gulf, C. & S. F. Ry. Co. v. Oakes,* 94 Tex. 155, 58 S.W. 999 (1900).

When use is reasonable, lawful and without negligence, the adjacent property owner may not complain. As neither unlawful nor negligent use were alleged in the principal case, this line of reasoning would require that defendant's acts be unreasonable if plaintiff is to recover. In determining reasonableness in this connection, the test has been held to be whether an ordinary person would make a similar use considering the importance of the use and the amount of the damages inflicted. *Gray v. Woodring Lumber Co.,* 197 S.W. 231 (Tex. Civ. App. 1917) *error refused.* Plaintiffs' allegations of damages coupled with defendant's failure to state the purpose of his use would seem to establish a prima facie case that defendant's actions were unreasonable. Indeed the court seems to be substantially influenced by the magnitude of the potential damages to plaintiffs' crops should "[t]he arm of the law [be] too short [or] too weak to reach out to the pond and take away the wild geese maintained . . . to atract their kind in ever increasing numbers."

Upon first reading the reasoning of the defendant and dissenting justice seems overwhelming logical. The defendant was guilty of neither an unlawful nor negligent act, and certainly a man should not be held for the trespass of wild geese in which it was not even alleged defendant had a property right. However, nuisance can arise from an unreasonable though non-negligent act and requires no physical trespass for recovery. As Justice Cardozo so eloquently expressed it, "Nuisance . . . does not involve the element of negligence as one of its essential factors. One acts sometimes at one's peril. In such circumstances, the duty to desist is absolute whenever conduct, if persisted in, brings damage to another." *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 160 N.E. 391 (1928) citing *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549 (1907). If, as in the McCarty case, mere noxious odors provide such circumstances as to be compensable, certainly an action should accrue for the damages arising from hordes of gluttonous geese feeding upon plaintiffs' grain at the open invitation of defendant.

The principal case seems to reflect the current outlook of the majority of American jurisdictions upon the question of absolute liability. Though rejecting the doctrine of *Fletcher v. Rylands*, L.R. 3 H.L. (E. & I. App.) 330 (1868), they reach substantially the same result by finding a nuisance where one is damaged by another's non-negligent act. Such holdings as that in the present case seem thinly disguised when compared to the *Fletcher v. Rylands* doctrine that "the person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief . . . is prima facie answerable for all the damage which is the natural consequence of its escape." Regardless of the basis for the holdings, the principal case seems to be approaching both *Fletcher v. Rylands* and the ancient command of Roman law "to use your own so that you do not injure another."

Granville Dutton.

TORTS — WRONGFUL DEATH ACT — CONTRIBUTORY NEGLIGENCE OF ONE BENEFICIARY

Action was brought under the Wrongful Death Act by the administrator of the estates of the deceased wife and child of the defendant. The beneficiaries under the Act are the defendant and his remaining child for whom the administrator is bringing the action as next friend. The petition alleged that the defendant had driven at a high rate of speed through a stop sign, causing a wreck which resulted in the death of the wife and a child of the defendant, and injuries to the remaining child of the defendant. *Held:* The action under the Wrongful Death Act is barred because the defendant is one of the beneficiaries and would share in the proceeds, thereby profiting from his own wrong. *Nudd v. Matsoukas*, ...Ill........., 128 N.E.2d 609 (1955).

Under the common law, there is no recovery for the death of a human being. *Vanderford v. City of Houston*, 286 S.W. 568 (Tex. Civ. App. 1926); *Hill v. Shafty*, 201 N.Y.S. 29, 121 Misc. 273 (1923). In order to alleviate this harsh rule, all jurisdictions have passed statutes which will allow recovery when the death is occasioned by a wrongful act of another. *Smith v. Williams*, 1 N.E.2d 643 (Ct. of App. 1925); *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 346 (5th Cir. 1937).

The statutes granting recovery are of two distinct types. One is modeled after the famous Lord Campbell's Act, generally creating a new cause of action which becomes vested in the benficiaries upon the wrongful death. This type is what is commonly referred to as the Wrongful Death Statute. *Blocker v. Brown Express*, 158 S.W. 2d 347 (Tex. Civ. App. 1942). The other type, Survival Statute, generally provides for the survival of the cause of action which the deceased would have had for personal injuries, if he had lived. No new cause of action arises, as the cause of action which the deceased would have had is merely transferred to his personal representative. *Marcus v. Huguley*, 37 S.W.2d 1100, (Tex. Civ. App. 1931) *error dism.; Okmulgee Gas Co. v. Kelly*, 105 Okl. 189, 232 P. 428 (1924).

The statutes almost universally require that recovery is for the benefit of designated beneficiaries. *McFadden v. May*, 325 Pa.

145, 189 A. 483 (1937); *Gibson v. Solomon,* 136 Ohio 101, 23 N.E.2d 996 (1939). The representative who brings the action is said to be a statutory trustee for the beneficiaries, *Streeter v. Graham & Norton Co.,* 259 N.Y.S. 14, 144 Misc. 516 (1932); *Baltimore American Ins. Co. of New York v. Cannon,* 181 Okl. 244, 73 P.2d 167 (1937), and he must distribute the proceeds to the beneficiaries named in the statute. *Murphy v. Province,* 153 Ark. 240, 240 S.W. 421 (1922).

But, if the beneficiary contributes to the death, then the majority of the courts will bar his participation in the proceeds, but will allow the innocent beneficiaries to recover. *Magnolia Petroleum Co. v. Porter,* 22 S.W.2d (Tex. Civ. App. 1929, error dism.), since a contrary holding would allow him to profit by his own wrong. However, some courts do not bar him from recovery, saying that common law defense, such as contributory negligence, should not be read into the statute to bar recovery. *Bastedo v. Frailey,* 109 N.J.L. 390, 162 A. 621 (1932).

Other courts will bar recovery to all beneficiaries when only one of them is contributory negligent. *Hazel v. Hoopeston-Danville Motor Bus Co.,* 310 Ill. 38, 141 N.E. 392 (1923). The principle behind such a holding seems to be conceived in the wording of the particular statute which indicates that the proceeds recovered are an entire and indivisible sum. Thus, these courts hold that recovery of that sum must either succeed or fail as to the whole, and cannot be apportioned as to innocent and negligent beneficiaries.

Texas courts take the view that the very purpose of the Act is to compensate survivors of the deceased for the damage they have suffered by reason of his death. *Norman v. Valley Gin Co.,* 99 S.W.2d 1065 (Tex. Civ. App. 1936) *error ref.* No Texas cases directly on point have been found, but it would seem that negligence of one beneficiary would not bar recovery as to the innocent beneficiaries under the Texas wrongful death statute, TEX. REV. CIV. STAT. (1925), art 4671, 4672 and 4675. It provides that an action can be maintained by "the surviving husband, wife, children, and parents," of the deceased, and that each beneficiary must show pecuniary loss before he can recover. *Peavey v. Hardin,* 288 S.W. 588 (Tex. Civ. App. 1926). This would seem to indicate that each beneficiary is to be compensated for his individual pecuniary loss, the negligence of other beneficiaries notwithstanding. The fact that Texas courts require joinder of the beneficiaries is not inconsistent with the idea of a separate recovery. *Galveston-Houston Electric Ry. Co. v. O'Rear*, 113 Tex. 456, 258 S.W. 803 (1924). Possibly, Texas courts could construe such joinder much the same as do those courts which require that a personal representative and a beneficiary, each given separate causes of action by the particular statute, be joined. Under this type of statute the Arkansas courts have held that despite such joinder the recovery as to each must be separate, the negligence of one not being a bar to the other's right of recovery. *Sinclair Refining Co. v. Henderson*, 197 Ark. 319, 122 S.W.2d 580 (1938).

If this result is reached by the Texas courts, then it seems quite probable that the suit can still be treated as being by individual beneficiaries and thus there is no apparent reason why the negligence of one will bar the recovery by the others.

It seems that the Illinois legislature has come to this conclusion, since the Illinois death statute, ILL. REV. STAT. 1955, Chap. 70, Séc. 1 and 2 was amended subsequent to the principle case, so that it is definite now that the contributory negligence of one beneficiary will not bar recovery by innocent beneficiaries.

Malcolm E. Dorman.