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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

Brokers—Regulation and Conduct of Business—Whether or Not a Real Estate Salesman Is a Person Entitled to Invoke Provisions of Law Regulating Real Estate Brokers and Providing for Forfeiture of Certificate of Registration—In the case of Sigler v. Massachusetts Bonding & Insurance Company,\(^1\) it appeared that plaintiff, a real estate salesman, earned certain commissions but was not paid the same by his broker-employer. After reducing such claim to judgment, plaintiff then sued the defendant surety company on its bond given to insure the faithful observance by the broker of the requirements of the applicable statute.\(^2\) The trial court held in favor of the defendant on the ground that the plaintiff was not entitled to the benefit of the bond, but, on appeal, such judgment was reversed.\(^3\)

The business of conducting a real estate brokerage office has been subjected to extensive regulation in recent years, principally along the

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\(^1\) 71 Ohio App. 425, 50 N.E. (2d) 390 (1941). The case, though decided in 1941, was first published in the Northeastern Reporter advance sheet dated September 15, 1943.

\(^2\) Direct action against the surety in such cases was held proper in La Rose v. Alliance Casualty Co., (La. App.) 150 So. 455 (1933).

\(^3\) Doyle, P. J., dissented on the theory that plaintiff did not fall in the class of persons whom the legislature intended to protect.
line of requiring registration or license. The license so granted is usually conditioned upon the due observance of the requirements of the law, with provision for forfeiture in case violation occurs. To provide further protection, some states require the broker to furnish a surety bond and permit suit thereon by any person who may be damaged by the broker’s failure to conduct his business in accordance with the statute. One common provision found in such statutes, however, requires the broker “to account for or to remit for any moneys coming into his possession which belong to others,” but the statutes do not elaborate upon who such “others” may be. It was this ambiguity which required solution in the instant case and upon which point no precedent appears to exist.

The undoubted purpose in enacting statutes of this character was to protect the public by requiring that the real estate brokerage business be conducted only by honest and competent persons. Such protection was also probably primarily intended for the particular benefit of that part of the general public who would have occasion to employ real estate brokers as agents in the handling of transactions relating to real

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4 Semenow, Survey of Real Estate License Laws (prepared for The National Association of License Law Officials), Rev. Ed., 1941, p. 69, presents a chart showing such statutes have been enacted in all states, including the District of Columbia, with the exception of Connecticut, Delaware, Indiana, Kansas, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, North Dakota, Rhode Island, South Carolina, and South Dakota. Though not uniform, the statutes are substantially alike.


6 Bonding provisions are found in nine states and the District of Columbia. A typical provision is that concerned in the instant case, found in Page’s Ohio Gen. Code Ann., §6373-35, which reads: ‘No real estate broker’s license shall be issued until . . . a bond . . . in the sum of $1,000 . . . shall be filed . . . conditioned upon the faithful observance of all the provisions of this act and shall also indemnify any person who may be damaged by a failure on the part of the applicant . . . to conduct his business in accordance with . . . this act.’ Where bonding provisions are found, the amount of the bond varies. It is $1,000 in the states of Idaho, Kentucky, Montana, Nevada, Ohio, Utah and Washington; is $2,500 in Arizona and the District of Columbia; and may be as high as $10,000 in Louisiana. West Virginia requires a bond of $2,000 from non-resident licensees only. See Semenow, op. cit., pp. 88-9. No such provision is contained in the Illinois statute.


8 The term “others” clearly includes customers of the broker according to Walton v. Carly, 7 Cal. App. (2d) 183, 45 P. (2d) 438 (1935); Goody v. Maryland Casualty Co., 53 Ida. 523, 25 P. (2d) 1045 (1933); Manale v. Harris, (La. App.) 165 So. 339 (1936); Boisseau v. Fidelity Union Casualty Co., (La. App.) 149 So. 175 (1933). It has been held not to protect one who deals with a broker as a known contracting party, since in such case the broker is not then practicing the “business of real estate brokerage,” according to Woods v. National Surety Co., 27 Ariz. 479, 233 P. 900 (1925).

9 A failure to share commissions with an independent broker was before the court in J. B. Green Realty Co. v. Florida Real Estate Commission, 130 Fla. 220, 177 So. 535 (1937), where such failure was held to justify suspension of license.

property. That relationship hardly exists between a real estate broker and his salesman, for the latter is not dealing with the broker as would a principal but rather as one who owes to his employer certain legal duties. It could, therefore, be reasoned that statutes of the type in question were not passed for the purpose of insuring to the employee of the broker the collection of his commission, hence his only protection would lie in the common-law duty of a principal to compensate his agent for services rendered. It would also seem that he is not one of the "others" referred to in such statutes.

The court in the instant case, however, concluded that since the Ohio statute required that the bond be worded for the protection of "any person" damaged by a violation of the statute, that phrase must necessarily be all-inclusive, and should not be limited to those who, as principals, had hired the services of a licensed broker. The court also gave content to the phrase "any moneys . . . which belong to others," by holding that the salesman's share of the commission was an undivided part of the total price collected by the broker from the sale of property, hence was no different than the net balance due the customer. Since the net balance was clearly "moneys . . . which belong to others," the court reasoned that the gross sum must be in the same category.

The precise question cannot very well arise in Illinois as the statute of this state makes no provision for a bond. It does, however, provide for the forfeiture of license and complaint might be made, on similar facts, for such relief. It may be of some value to note that the Department of Registration and Education, charged with the enforcement of that statute, has prepared certain instructions for the preparation of real estate complaints. One such instruction reads: "Be sure that your complaint involves illegal or unethical real estate practice. This Department will not be used as a collection agency. Failure to pay a commission is not the basis of a valid complaint." The Department has, therefore, apparently construed the Illinois statute to apply for the protection of the customer only and not for the protection of the real estate salesman.

It might well be that if it appeared that the broker made a constant practice of withholding commissions from his agents and salesmen, such practice would bring into question the honesty and integrity of the broker and thus become a valid basis for a revocation of his license. But to allow a salesman to institute proceedings to secure revocation merely on the basis of one isolated instance of a commission withheld would not

11 Firpo v. Murphy, 72 Cal. App. 249, 236 P. 968 (1925); Mapes v. Foster, 38 Wyo. 244, 286 P. 109 (1928).
13 Failure to pay commissions is not specifically made a violation of the statute. It might, however, be deemed such, by inference, from the catch-all phrase that "any other conduct . . . which constitutes dishonest dealing" is ground for forfeiture of license. See Page's Ohio Gen. Code Ann., §6373-42(6); Ill. Rev. Stat. 1943, Ch. 114 ½, 18(i).
14 See pamphlet entitled Instructions for Preparation of Real Estate Complaints, prepared by Division of Registration for the Department of Registration and Education, Springfield, p. 4.
seem to be within the general purpose of such legislation since it would have nothing to do with affording protection to the public. In this light, it is doubtful if the Ohio decision would be followed in Illinois.

MARY JANE SACCOME

CARRIERS—CARRIAGE OF PASSENGERS—WHETHER OR NOT CARRIER, IN WHOSE DEPOT VAGRANTS TEND TO CONGREGATE, IS BOUND TO ANTICIPATE CRIMINAL ASSAULT BY VAGRANT UPON PASSENGER HENCE UNDER A DUTY TO EXERCISE CARE TO PREVENT SUCH OCCURRENCE—The case of Neering v. Illinois Central Railroad Company\(^1\) involved a suit by an habitual passenger against defendant carrier to recover damages for personal injury on the ground that she had been criminally attacked by a vagrant while she was waiting for a train at an unpoliced station. Judgment for the plaintiff, reversed in the Appellate Court, was reinstated and affirmed by the Illinois Supreme Court when it held that the defendant had been negligent in failing to provide a guard at the station even though it had complied with all of the rules of the Illinois Commerce Commission, particularly those relating to the lighting and heating of stations.

While carriers owe to their passengers the highest degree of care when on the trains, only ordinary care is the due of such passengers when at the stations and depots.\(^2\) Furthermore, a carrier is only bound to expect passengers to shelter themselves at the station for no more than a reasonable time before train-time.\(^3\) Liability in the instant case, however, appears to have been predicated upon the fact that the defendant should have anticipated that passengers might be attacked by strangers while waiting at the station hence was obliged to provide protection against such possibility. The theory upon which such liability depends is worthy of examination.

It can hardly be based upon a breach of contract to carry safely since it cannot be said that a railroad represents itself as selling police protection as well as transportation. In fact, quite the contrary would seem to be the case, for the decisions in which such argument has been made have resulted in a denial of liability. For example, it was held that the robbery of a passenger on the car steps, absent proof of the ability of the carrier’s agents to protect or of refusal to try to protect against armed gunmen, was not enough to impose liability.\(^4\) Likewise, where a tramp boarded a car between stations, robbed plaintiff, and disappeared before the next stop, so that there was no possibility of

\(^1\) 383 Ill. 366, 50 N.E. (2d) 497 (1943), reversing 315 Ill. App. 599, 43 N.E. (2d) 604 (1942).
\(^3\) Illinois Cent. R. Co. v. Laloge, 113 Ky. 896, 69 S.W. 795 (1902). In the instant case, plaintiff had been riding on the same night train for a long period of time. Her status as a passenger seemed sufficiently established while she waited for such train at a regular station. Her appearance there was reasonably close to train-time.
DISCUSSION OF RECENT DECISIONS

defendant anticipating such occurrence or of guarding against it, recovery was denied.\(^5\)

The liability cannot be said to depend upon the presence or absence of defendant's employees, for that fact has been held immaterial. Recovery has been denied where securities were lost by hold-up in a car where no employee was present.\(^6\) Conversely, the presence of some twenty-eight policemen in attendance about the station where the assault occurred has not led to liability.\(^7\) The main test in such cases turns on whether or not the occurrences could be anticipated. If, however, an employee is present when the difficulty occurs, the carrier might be held if such agent fails to discharge the duty he owes to at least attempt to protect the passenger.\(^8\) The same result will follow if the employee is absent when it is his duty to be present and watchful.\(^9\) But none of these cases approach the doctrine in the instant case.

There is, moreover, a fundamental general rule that no duty exists to anticipate the wilful or criminal actions of others.\(^10\) While apparent exceptions to that rule may be found, such cases may be adequately distinguished. Thus, the negligently wrongful or instinctive acts of third persons will not serve to exonerate the first actor if such could reasonably be anticipated, as in the well-known "squib" case,\(^11\) because such subsequent acts are then regarded as part of the natural chain of events put in motion by the original wrongful act. In the same way, one allowing an inexperienced or intoxicated person to drive a car will suffer liability in case of accident because some accident was foreseeable, hence a duty was owed and breached.\(^12\) Such was also the case where a contractor left quicklime on a sidewalk and the substance was thrown at a street-car by small boys.\(^13\) There, by reason of a combination of attractive nuisance and the acts of human but not entirely responsible agents, since the boys were technically incapable of committing a crime, the prior fault of the contractor was enough. Other cases illustrate the principle that a person who places another in a position to defraud should be answerable to persons thereby damaged.\(^14\) But in all of them,

\(^{5}\) Beasley v. Hines, 143 Ark. 54, 219 S.W. 757 (1920).
\(^{8}\) Terre Haute, Indianapolis & Eastern Traction Co. v. Scott, 197 Ind. 587, 150 N.E. 777 (1926).
\(^{9}\) Pullman Co. v. Culbreth, 2 F. (2d) 540 (1924).
\(^{10}\) In Ward v. Southern Ry. Co., 206 N.C. 530, 174 S.E. 443 (1934), the criminal acts of negroes in throwing coal from cars were held unforeseeable although such acts had taken place repeatedly over a period of thirty-two years and ultimately resulted in the death of plaintiff's intestate. A third person's forgery of old, "spent" bills of lading has been held not open to anticipation: Saugerties Bank v. Delaware & Hudson Co., 258 N. Y. 425, 141 N.E. 904 (1923). Three judges dissented.
\(^{13}\) Katz v. Helbing, 215 Cal. 449, 10 P. (2d) 1001 (1932).
the defendant's prior fault could be regarded as the initial impetus which produced the ultimate result.

In the absence of such exceptional cases, and the instant case cannot be said to be one of them, the ordinary reasonable and prudent man cannot logically be expected to anticipate criminal conduct and should not be under a duty to protect against the same. Any such criminal acts should be regarded as the sole, or at least a superseding, cause and it was so regarded at common law.\textsuperscript{15} Such rule has not yet been repudiated, and should be changed only if, and to the extent that, criminal acts might become so common and frequent in a given community that the average man could be said to expect and anticipate them at any time. As a matter of fact, the cases still generally refuse to recognize any exception to that principle. The following recent cases are merely illustrative of this fact. In one, though it was deemed carelessness to permit two high-school students to have access to a cabinet containing chemicals without providing adequate supervision, still their criminal act in stealing the chemicals was held to supersede such prior negligence so that another student, obtaining chemicals from the thieves and injured by an explosion thereof, was regarded as their victim and not that of the school.\textsuperscript{16} In another case plaintiff was thrown from the balcony to the floor below when other patrons drew gun and knife during an argument at a boxing match. It was held that the prior shouting and excitement, natural at such a place, created no duty to be particularly watchful for plaintiff's safety.\textsuperscript{17} Again, although a disturbance was caused by a guest at the closing of a night club when he was ejected, it was held that it could not be expected that he would come back, break the door, and shoot another patron.\textsuperscript{18} Similarly, when railroad passengers had been warned to desist from throwing paper cups at one another and the conductor had gone to another car after they had desisted, it was held there was no duty to expect a resumption of the horseplay, nor that as a result thereof a passenger would be hurt by a hard object

\textsuperscript{15} In Hullinger v. Worrell, 83 Ill. 220 (1876), a sheriff negligently permitted the escape of a prisoner who was on trial for assaulting plaintiff. The subsequent criminal act of the escaped prisoner in again assaulting plaintiff was held not foreseeable.

\textsuperscript{16} Frace v. Long Beach City High School Dist., 58 Cal. App. (2d) 556, 137 P. (2d) 60 (1943).

\textsuperscript{17} Shayne v. Coliseum Bldg. Corp., 270 Ill. App. 547 (1933). Perhaps the court felt that spectators at boxing matches expect a certain amount of excitement among other spectators as a part of the main attraction, hence could be deemed to assume part of the risk.

\textsuperscript{18} Brodie v. Miller, 24 Tenn. App. 316, 143 S.W. (2d) 1042 (1940).
concealed in a cup.\textsuperscript{19} In short, the criminal acts of third persons have heretofore been held, both in Illinois and elsewhere, to supersede any original wrongful act on defendant's part.

Perhaps the closest case to the instant one, a decision relied on most strongly to support such holding, is that of \textit{Chicago and Alton Railroad Company v. Pillsbury}.\textsuperscript{20} Plaintiff there was badly beaten by strikers who invaded a train after some non-striking workers had been picked up at a special stop under a police escort. The original act of negligence therein was held to consist of stopping a train at an unusual place to pick up such workers and in thereafter failing to keep them sufficiently segregated from the other passengers.\textsuperscript{21} That case, however, differs from the instant one in that first, the duty owed to a passenger inside a train is always greater than the duty owed him at a station, and second, because acts of violence were there definitely known to have occurred and to be still threatened. In another Illinois case, a taxicab company was held liable to a passenger injured by strikers because the defendant knew of the strike and of previous acts of violence while the plaintiff had come into the city too recently to be aware of the situation hence could not be said to have assumed the risk.\textsuperscript{22} In contrast thereto, the absence of either element of striking or of prior violence has usually led to a denial of recovery\textsuperscript{23} for the carrier cannot be said to be under a duty to so armor its cars as to prevent injury by broken glass.\textsuperscript{24} Even where a strike was in progress and a preceding street-car had been stoned by strikers shortly before, still since neither the company nor the driver of the following car knew of that fact, it was held there was no negligence in continuing on the journey hence recovery was denied to a passenger riding in the second street-car.\textsuperscript{25} Again, in the absence of strike, but where plaintiff and the driver could see boys throwing things across a street in front of a street-car, it was held not negligent to proceed because it would reasonably be expected the boys would cease their acts while the street-car passed.\textsuperscript{26} In the light of such holdings, the decision in the instant case appears extreme for there was no proof therein of prior violence such as might have served to put the carrier on notice that repetition thereof was to be expected.\textsuperscript{27}

\begin{itemize}
  \item \textsuperscript{20} 123 Ill. 9, 14 N.E. 22 (1887).
  \item \textsuperscript{21} The final decision therein was reached only after a rehearing. The original majority opinion became the dissenting opinion. See 8 N.E. 803 (1886).
  \item \textsuperscript{22} Rose v. City of Chicago, 317 Ill. App. 1, 45 N.E. (2d) 717 (1943).
  \item \textsuperscript{23} Woas v. St. Louis Transit Co., 198 Mo. 664, 96 S.W. 1017 (1906).
  \item \textsuperscript{24} Fewings v. Mendenhall, 88 Minn. 336, 93 N.W. 127 (1903).
  \item \textsuperscript{25} Bosworth v. Union R. Co., 26 R. I. 309, 58 A. 982 (1904).
  \item \textsuperscript{26} Shepard v. Kansas City Public Service Co., 236 Mo. App. 1118, 162 S.W. (2d) 318 (1942).
  \item \textsuperscript{27} The court did, however, indicate that by allowing vagrants to congregate, loiter and sleep in the depot waiting room, the carrier permitted a condition to exist which amounted to a menace to public peace and from which some unlawful act might reasonably be anticipated.
\end{itemize}
The so-called "Hobo-Hollow" case\(^2\) comes closest to the problem here involved for it did depart from the general rule that criminal acts are to be regarded as a superseding cause. In that case liability was imposed on a carrier because a female passenger was raped after the conductor had negligently carried her past her station, had compelled her to leave the train instead of arranging for her transportation back to her original destination, and forced her to walk alone at night through a notoriously dangerous neighborhood. That case may, however, be explained on the ground that there was a clear breach of contract arising from the negligent act of defendant in carrying plaintiff to the wrong station. In the instant case the defendant did nothing wrongful nor did it fail or neglect to do anything it had previously done.

In a negligence action, the court might well go to the extent of saying that if there is an act by defendant \textit{sine qua non} of the injury, liability should not be avoided because of an intervening act of another even though, but for such intervention, no injury or damage would have resulted.\(^3\) It is submitted that such is not the instant case for there had been no prior assault or difficulty at or near the station in question,\(^4\) the defendant's operation of its trains was as usual, and, even though the evidence tended to show that the police knew the neighborhood was infested with vagrants,\(^5\) they were not the agents of the defendant and gave it no warning of the existing conditions or of their inability to cope with them.\(^6\)

Carriers operating in Illinois must now, however, be particularly alert to the fact that, if they do not cancel their station stops at night, it is their duty to provide police protection for passengers for a reasonable time prior to each scheduled stop. They may not, apparently, rely on the activity of the regular police forces.


\(^4\) Plaintiff's testimony that she had repeatedly complained to defendant's agents of the presence of vagrants sleeping in the waiting room, making her afraid to seek shelter there even in inclement weather, was countered by defendant's evidence that not once had plaintiff ever been molested or even spoken to in the five years she used the station prior to the occurrence involved in the instant case. Employees of the defendant also denied seeing vagrants around the premises at any time. See 383 Ill. 366 at 373, 50 N.E. (2d) 497 at 500-1.

\(^5\) Police officers testified to some twenty-five or thirty arrests of vagrants on the station platforms for loitering, and of several attempts to break up the "hobo jungle" which existed nearby. The statement of facts does not disclose, except by inference, that the defendant knew of these police efforts: 383 Ill. 366 at 372, 50 N.E. (2d) 497 at 500.

\(^6\) Though the disputed facts were found in plaintiff's favor, it would seem as though defendant was never adequately warned of the possibility of danger. If, absent such notice, the carrier is to be held in cases such as this, its liability would seem to spring from the fact that by the operation of trains, requiring the use of tracks, freight cars, depots and the like, it creates a condition likely to attract vagrants who are commonly known to be offenders against the public peace. The social need for transportation should outweigh a liability based on so slender a foundation.
DISCUSSION OF RECENT DECISIONS

Corporations—Foreign Corporations—Whether or Not Foreign Corporation, Maintaining Stock of Merchandise Within State from Which to Fill Orders, Is Doing Business Within the State so as to be Amenable to Service of Process—In the recent case of Pergl v. U.S. Axle Company, the defendant, a Pennsylvania corporation, had for several years been manufacturing and shipping automobile axles to a warehouse in Illinois. The warehouse owner supplied the axles to jobbers named in a list compiled by the defendant, receiving payment by check or cash. Apparently the warehouse owner did not have to procure prior approval of such sales from the defendant although, on completion of the sale, the check or cash received was forwarded to the defendant in Pennsylvania. The plaintiff purchased an axle from one of the jobbers and installed the same in his automobile. The axle proved defective, and plaintiff was injured as a result. In a suit for personal injury, plaintiff caused the foreign corporation to be served through the warehouse owner, declaring the latter to be an agent of the corporation. Defendant, upon limited appearance, filed a motion to quash the service on the ground that it was not doing business in Illinois, that the warehouse owner was not its agent, and, if there was any relationship between the two, it was that of bailor and bailee. This motion was sustained by the trial court, but on appeal by plaintiff, the Appellate Court for the First District reversed, holding that the corporation was doing business within the state and that the warehouse owner was an agent.

In order to acquire jurisdiction over a foreign corporation which has not been licensed to do business in the state and has not appointed an authorized agent therein, two things are essential, namely: (1) there must be service on some agent within the state, and (2) the foreign corporation must be doing business in the state. Sufficient facts appear in the instant case to indicate an agency relationship between the warehouseman and the defendant corporation, for the warehouse owner could transfer the axles to jobbers without getting the approval of the corporation, and could receive payment for the same not as vendor but for the purpose of forwarding the amounts collected to the corporation in Pennsylvania. It could hardly be contended by the corporation that the jobbers did not get complete title to the axles so purchased, hence the warehouse owner must have been an agent and not a mere bailee. Service on an agent is sufficient to bind the foreign corporation, particularly if that agent has power to represent the corporation in the

1 320 Ill. App. 115, 50 N.E. (2d) 115 (1943).
transaction of some part of the business contemplated by its charter.\(^5\)

The first element is, then, clearly satisfied.

It has been said many times that the question of whether or not a foreign corporation is doing business in a state depends primarily on the facts of the case,\(^6\) but it would appear that a consideration of such facts is utilized to determine whether there is sufficient corporate activity to make it reasonable to bring the foreign corporation before the courts of the state.\(^7\) Thus it has been held that where textbooks were shipped to a warehouse within the state, to be supplied to correspondence school pupils with whom contracts had previously been made, the foreign corporation was doing business therein.\(^8\) In much the same way, the solicitation of orders by those authorized to receive payment, with machinery being constantly shipped to fill such orders, was deemed sufficient to treat the foreign corporation as doing business within the state.\(^9\) In another example, goods were shipped and stored within the state and solicitors took orders and filled them from the stored goods. The foreign corporation was held, likewise, to be doing business in the state in which the goods were so stored.\(^10\) Such cases support the conclusion that the corporation, in the instant case, also met the second requirement for valid service of process.

Considering the claim that there was merely a bailment relationship, it would appear that the existence of such relationship would be of no avail to the corporate defendant, even if it were proven. In that regard, it may be noted that the Circuit Court of Appeals for the Fourth Circuit, speaking in *Mas v. Orange-Crush Company*,\(^11\) said: "And it has often been held that a foreign corporation which ships goods in bulk into another state and there holds them in a warehouse for use in filling orders is doing business in that state."\(^12\) Such doctrine has also been voiced in other decisions,\(^13\) although it is true that an earlier Illinois case holds that where goods are stored in a warehouse for the purpose of filling orders, but approval of the order has to be obtained from the corporation in the home state, the latter is not to be regarded as doing business in the state.\(^14\) It should be remembered, however, that in the instant case the warehouse owner was not required to get sales ap-

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\(^{5}\) *Booz v. Texas & P. Ry. Co.*, 250 Ill. 376, 95 N.E. 460 (1911).


\(^{10}\) *Thomas Mfg. Co. v. Knapp*, 101 Minn. 432, 112 N.W. 989 (1907).

\(^{11}\) 99 F. (2d) 675 (1938).

\(^{12}\) 99 F. (2d) 675 at 678.


proval from the foreign corporation, and, in contrast to such Illinois
decision, a later Washington case holds directly to the contrary.\textsuperscript{15}

No sound reason exists as to why the mere approval of the order
in the home state of the foreign corporation should save it from the
charge of doing business within another state, particularly when delivery
is to occur from stocks of goods located there.\textsuperscript{16} There is then, no assur-
ance that the earlier Illinois decision would be followed in a later case,
especially now that the courts appear to be more lenient in determining
what facts are necessary to amount to a doing of business within a state
by a foreign corporation.

\textbf{Corporations—Officers and Agents—May Plaintiff, Who Successfully
Maintains Stockholder’s Derivative Suit and Thereby Benefits the Corpora-
tion, Be Reimbursed for Necessary Expenses and Attorney’s Fees Incurred
in Such Litigation—In Bingham v. Ditzler\textsuperscript{1}} the plaintiff, a minority share-
holder, instituted a derivative action to compel the restoration to his cor-
poration of moneys unlawfully appropriated by the officers and directors.
Plaintiff’s complaint included a prayer for the allowance of attorney’s
fees. The chancellor found in plaintiff’s favor on the major issues and
directed that an accounting be taken of the amounts due the corporation,\textsuperscript{2}
but decreed that, as a matter of law, plaintiff was not entitled to recover
attorney’s fees. In reversing such finding, the Appellate Court for the
First District held that where plaintiff successfully conducts his suit, so
that a benefit flows to the corporation therefrom, he is entitled to recover
the necessary expenses of such litigation, including attorney’s fees.

The opinion does not make it clear whether plaintiff sought such
compensation from the individual defendants or from the fund created
by the litigation. If recovery was sought from the former, such liability
could only arise by reason of contract or statute.\textsuperscript{3} Since no contract was
involved, personal liability, if any, would have to rest upon statute.
Section 42 of the Business Corporation Act\textsuperscript{4} provides for the liability
of corporate directors in eight enumerated instances, no one of which
was involved in the instant case. That section, however, also expressly
provides that any liability thereby created is “in addition to any other

\textsuperscript{15} State ex rel. Kerr Glass Mfg. Co. v. Superior Court, 166 Wash. 41, 6 P. (2d)
368 (1931).

\textsuperscript{16} Of course, title to the merchandise will pass from seller to buyer only at
such time and place as the parties to the contract intend the same should be trans-
ferred: Ill. Rev. Stat. 1943, Ch. 121\textsuperscript{1}, \$18. If, by the contract, title is not to pass
until the goods are delivered, the foreign corporation, though requiring acceptance
of the order in its home state, is clearly doing business at the place where
delivery is to occur: Ill. Rev. Stat. 1943, Ch. 121\textsuperscript{1}, \$19(5).

\textsuperscript{1} 320 Ill. App. 88, 49 N.E. (2d) 812 (1943).

\textsuperscript{2} Such decree was affirmed in Bingham v. Ditzler, 309 Ill. App. 581, 33 N.E.
(2d) 939 (1941), and leave to appeal was denied: 310 Ill. App. xiii. The cause was
returned to the trial court for the purpose of taking the accounting.

\textsuperscript{3} Ritter v. Ritter, 381 Ill. 549, 46 N.E. (2d) 41 (1943). See notes in CHICAGO-KENT
LAW REVIEW, Vol. 20, p. 83; Vol. 21, p. 30; and Vol. 22, p. 27.

\textsuperscript{4} Ill. Rev. Stat. 1943, Ch. 32, \$157.42.
liabilities imposed by law." The effect of such language has not yet been construed in Illinois, but it would seem to be limited to permit recovery only of losses incurred by wrongful conduct on the part of the directors, since that was the nature of their common-law liability. It is doubtful, then, if the individual defendants could have been charged with the item for attorney's fees and the court might, by inference from its silence, be regarded as rejecting any such claim, if one was in fact made.

The Appellate Court, in reversing, did direct the trial court to determine the reasonable value of the legal services rendered by plaintiff's attorney and ordered it to make allowance therefor from all moneys received by the corporation as a result of the prosecution of the cause. The charge was, therefore, to be made against the fund rather than the individual defendants. It is on this point that no prior determination of an Illinois court appears to exist, but it involves a common equitable principle that a party who, at his own expense, has maintained a successful suit for the preservation, protection, or increase of a common fund or who has created and brought into court a fund in which others may share, should be reimbursed for his labor, even though no statute authorizes such compensation. The rule has been said to rest upon the ground that "where one litigant has borne the burden and expense of the litigation that has inured to the benefit of others as well as to himself, those who have shared in the benefits should contribute to the expense."

As applied to corporate problems like that in the instant case, it has been uniformly held in other jurisdictions that a stockholder who institutes and successfully maintains a suit of this character, whether to regain corporate property fraudulently disposed of, to defeat a proposed fraudulent conveyance, or to remedy other like wrongs, is en-

6 320 Ill. App. 88 at 99, 49 N.E. (2d) 812 at 816.
7 Merle v. Beifeld, 275 Ill. 594, 114 N.E. 369 (1916), in fact involved the question, for the trial court's decree allowed plaintiff an attorney's fee. The decree was reversed, but the upper court refused to consider the precise question since error had not been properly assigned thereon.
8 49 A. L. R. 1145. The annotator cites Abend v. Endowment Fund Commission, 174 Ill. 96, 50 N.E. 1052 (1898), and Stahl v. Stahl, 168 Ill. App. 236 (1911), but both such cases involved the efforts of trustees to protect or augment the trust estate. In Kadish v. Chicago Co-operative Brewing Ass'n, 35 Ill. App. 411 (1890), a creditor who sued to wind up an insolvent corporation was denied compensation when it appeared that he was also a stockholder, liable for the corporate debts.
9 The statute regarding partition expressly provides for an allowance of fees: Ill. Rev. Stat. 1943, Ch. 106, §40. It has been held, however, that such allowance does not depend on the statute but upon general equitable principles: Ames v. Ames, 151 Ill. 280, 37 N.E. 890 (1894).
10 49 A. L. R. 1145 at 1152.
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titled to an allowance from the funds or property thus recovered for his expenses, including attorney’s fees. The fact that the particular plaintiff’s holdings in the corporation are so minute that he will personally gain little from the fund so realized has been held insufficient to defeat such allowance.\(^{14}\) Denial of reimbursement has, however, occurred where the plaintiff failed to produce a benefit,\(^{15}\) or where it appeared his action was groundless for failure to exhaust his remedy within the corporation.\(^{16}\)

The social justification for such a rule is readily apparent. It has been said that if reimbursement were not permitted “the practical effect would be the same as if the suits were prohibited and the small stockholder remediless, for the expenses in most cases would exceed the increase in the value of his stock, resulting in a net loss . . . Yet it is to the interest of society that the stockholder not only be permitted to bring suit . . . but that he be encouraged to take the initiative. Assuring the stockholder that, if successful, he will not be obliged personally, to pay the entire cost of the suit is hardly too much inducement. He still takes all the hazards of defeat. . . . ”\(^{17}\) If it should be argued that the individual directors, whose fault necessitated the litigation, should be called upon to foot the bill, the simple answer is that the legislature may impose such liability any time they may see fit to do so.\(^{18}\) Until they do, the instant case must be regarded as being within the general view and the outcome thereof one which might have been anticipated. It goes without saying that the ruling will be welcomed by minority stockholders and their counsel.

C. P. DIVINCENZO


\(^{14}\) Winkelman v. General Motors Corporation, 48 F. Supp. 504 (1942), in which plaintiff held 10 shares out of 43,000,000 shares outstanding and personally gained about 10c per share. See also Smolowe v. Delendo Corporation, 136 F. (2d) 231 (1943), where plaintiff held 150 shares of some 800,000 outstanding and benefited to the extent of about $3.00, yet was allowed $3,000 for counsel fees in addition to other expenses.


\(^{17}\) Hornstein, The Counsel Fee in Stockholders’ Derivative Suits, 39 Col. L. Rev. (1939) 784 at 791.

\(^{18}\) For comparable statutes, see Ill. Rev. Stat. 1943, Ch. 13, §13, and Ch. 79, §58, in case of suits for wages; Ch. 114, §117, for suits involving damage to grain shipments; Ch. 47, §10, for dismissal of eminent domain proceedings; and Ch. 73, §767, for vexatious refusal to pay proceeds of insurance.
Insurance—The Contract in General—Whether or Not the "Fractional Day" Rule Should Be Applied to Determine Expiration of an Insurance Contract Beginning at a Stated Hour but Extending for a Fixed Period of Days, Months, or Years—In the case of Greulich v. Monnin, an injured person sued, and recovered judgment against, the insured driver of an automobile. Thereafter, pursuant to local procedure, the plaintiff named the defendant's insurance company as an additional party and sought to recover from them on the policy. The company contended that the policy was not in effect when the collision occurred since it had been issued to commence at twelve o'clock noon on September 6, 1934, for a term of six months, whereas the accident did not occur until 11:30 p.m. on March 6, 1935. The trial court, nevertheless, found in plaintiff's favor and, upon appeal, such judgment was affirmed, the Ohio Supreme Court holding that the general time rule as to fractional days should apply. The provision of the policy, set out below, though precise as to the time of its commencement, was ambiguous as to the precise point of its termination. As a consequence, a question arose as to whether the protection under the policy expired at twelve o'clock noon on the last day or was to continue throughout the entire day. The court, settling that question as between the parties, refused to compute the fractional part of the last day and held the contract to be in force throughout the entire period thereof, resting its decision squarely on the general time rule.

The holding of the Ohio court is not without some support. Yet, the general rule is often subject to exceptions where such exceptions will promote equity, and there is a substantial line of decisions directly opposed to that holding. There is some confusion as to when the general rule as to fractional parts of a day should be applied. Contracts of insurance which begin and end at a set hour of day, generally noon, present no special problem. In the same way, those that begin on a certain day and end on a certain day have posed no insuperable obstacle for a court could fairly rest its decision on general rules. But where a contract of insurance, like the instant one, begins at twelve o'clock noon and extends for a term of days, or years, careless drafting creates a problem not susceptible to ordinary treatment. In Purvis v. Commercial Casualty Company, for example, an accident policy extended "... for a term of twelve months from the third day of September, 1928, from noon standard time. . . ." The insured was injured on the afternoon of the last day. The insured's receipt book gave him the right to renew the policy "on or before September 3," and the court might have seized upon this as inferentially including the whole of the last day. That fact pro-

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1 142 Ohio St. 113, 50 N. E. (2d) 310 (1943), affirming 45 N. E. (2d) 212 (Ohio App. 1942). Hart, J., wrote a dissenting opinion predicated on the ground that the statutory rule for computing time should not apply to contracts evidencing an intent to substitute some other rule.

2 The clause read: "... said insurance shall become effective at 12 o'clock noon, Eastern Standard Time, on the 6th day of September, 1934, and shall continue in force for the initial term of 6 months, and for each succeeding term of 6 months, as the premium is paid."

3 160 S. C. 484, 159 S. E. 369 (1931).
vided an excellent opportunity for the application of the general rule to a situation more susceptible to its application than the present case, yet the contract was held to have expired at noon. In *Troy Automobile Exchange v. Home Insurance Company*, the policy ran from noon to noon, but a certificate kept it in force "... from August 30, to September 30." The policy was held to have expired at noon, despite the ambiguity in the certificate. Again, in *Matthews v. Continental Casualty Company*, a policy insuring against accident occurring within one year from twelve o'clock noon, December 11, 1902, was held not to cover an accident happening at 4:00 p.m. on the last day.

Even where an insurance company has habitually accepted delinquent premiums under an accident policy providing that payment of overdue sums revived the policy, the insurer was held not to be estopped from claiming suspension by a tardy payment under a contract commencing and ending at noon, even though the same provided for a grace period of five days. In this last mentioned case, the deceased was killed at 4:30 p.m. on the afternoon of the fifth grace day. The court could have easily decided the case under the general time rule and could have included the entire last day in the period of coverage, but refused so to do.

On the other hand, in granting to the insured the additional hours of protection for which he presumably has not paid, courts have often rested their decision upon the fact that insurance contracts are prepared by the insurance companies, hence all ambiguities should be construed against them and favorably to the insured. In one instance, the court disregarded fractions of a day because of the inconvenience thereby caused. Still another court merely stated the general rule, without its limitations, and mechanically included the whole of the last day. Support may be found, therefore, for either side of the problem.

The general time rule has its roots in situations created not by contract but by statutory and other legal requirements that certain acts be done within certain time limits. To these situations, the general rule of computing time is perfectly fair to all parties interested, but it is an arbitrary rule formed purely as one of convenience for the courts. It should not, however, be applied if there are means of computing the

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4 189 N. Y. S. 796 (1918).
5 78 Ark. 40, 93 S. W. 55 (1906).
10 Ill. Rev. Stat. 1943, Ch. 100, §6, for example, reads: "In computing the time for which any notice is to be given, whether required by law, order of court or contract, the first day shall be excluded and the last included, unless the last day is Sunday, and then it also shall be excluded." The section is included in the chapter dealing with publication of notices. See also Ill. Rev. Stat. 1943, Ch. 131, §1, as to the general rule for statutory construction.
time from the actual stipulations in the contract. To hold otherwise, and thereby give the insured the benefit of the entire last day without reference to the equities of the case, is to take refuge in a convenient rule, and to present, gratis to the insured, additional hours of insurance not within his contemplation at the time he made the contract.

J. E. Reeves

NEGLIGENCE—PROXIMATE CAUSE—WHETHER OR NOT OWNER AND OCCUPANT OF BUSINESS PREMISES IS LIABLE FOR NEGLECTIVE MAINTENANCE OF REVOLVING DOOR WHICH CAUSED INJURIES TO INVITEE WHEN PUSHED RAPIDLY BY NEGLIGENT ACT OF A THIRD PERSON—In Hansen v. Henriici’s Incorporated, the Illinois Appellate Court for the first time was called upon to decide whether or not a business proprietor was liable for personal injuries sustained by a customer when passing through a revolving door. The evidence therein disclosed that, as plaintiff was leaving the revolving door on his way into defendant’s restaurant, the door was caused to move rapidly by two young men who were departing through the same. One of the panels of the door struck plaintiff in the back, throwing him to the ground and injuring him. Plaintiff contended that defendant was negligent in failing to maintain rubber and felt flanges on the top, sides, and bottom of the revolving door of such size and in such condition as would serve to retard the speed of the door during its revolution. Defendant contended there was no defect in the door but, even assuming it was defective, yet on the uncontradicted evidence such defect was not the proximate cause of the injury; that the real cause was the force of the departing young men who pushed the door. If there was a defect, defendant argued, it was nothing more than a condition acted upon by a third person’s independent conduct for which the defendant should not be held liable. The evidence disclosed that while the flanges on the door served the dual purpose of retarding speed and keeping out cold air, still they had been permitted to become frayed and failed to make contact with the floor and the sides of the door frame. On these facts, verdict and judgment for the plaintiff was affirmed.

In support of its holding, the court cited the Massachusetts case of Norton v. Chandler & Co., Incorporated, which sustains the view that where rubber strips are placed on a revolving door for the dual purpose of shutting out cold air and also of retarding speed, the defendant, by allowing such strips to become so worn as to fail in their purpose, is guilty of actionable negligence. In agreement with that position might be added a later Massachusetts case as well as two cases from Maryland.

12 It would seem that the intention, in the instant case, was to have the policy commence and end at noon. See Corey v. National Ben Franklin Ins. Co., 284 Mass. 283, 187 N. E. 542 (1933).

1 319 Ill. App. 458, 49 N. E. (2d) 737 (1943).
Language in the Missouri case of *Wiedanz v. May Department Stores Company* would also indicate that the courts of that state would agree on this point. There is fair ground, therefore, for the conclusion that one who maintains a revolving door on his premises has a duty to see that the same is adequately equipped to prevent too rapid rotation.

Of greater significance is the holding on the contention that defendant's negligence was not a cause but only a condition through which the independent act of a third person was able to cause injury. In support of its action in overruling such contention, the court cited the Chandler case, the Restatement of Torts, and New York and Oregon cases. In these cases it had been held that the act of a third person in spinning the revolving door at an excessive speed was only a concurrent cause, hence would not relieve the defendant proprietor from liability for any negligence in construction or maintenance. By holding in the instant case that the act of the departing customer was not a superseding cause, the court deemed it reasonable that the defendant, in the exercise of care, should have foreseen such an occurrence. The court might have cited still another Massachusetts case and one from Maryland to support such holding.

It should be observed that in all of the cited cases similar to the one under discussion the revolving door rotated with great rapidity because the door was, in some way, defective. But such a door must move easily in order to permit ingress and egress by persons of all ages and of varying degrees of strength. A mere showing that such a door moves with rapidity when pushed with extra force should not, then, be sufficient to hold the owner liable. Without evidence that he was in some way careless, as by allowing the door to become or remain in a defective condition, liability should be denied. Evidence of negligence should,
properly, be regarded as necessary since the owner or occupant of business premises owes to his invitees only the duty to keep his premises in a reasonably safe condition. The law does not make him an insurer of his customer's safety.\textsuperscript{15}

W. S. GROTEFELD

\textbf{TORTS—RESORT TO OR CONDUCT OF LEGAL REMEDIES—WHETHER OR NOT FORMER CORPORATE OFFICIAL WHO PROSECUTES SUIT IN THE NAME OF DEFUNCT CORPORATION IS LIABLE TO DEFENDANT THEREIN FOR ATTORNEY'S FEES AND EXPENSES INCURRED IN DEFENDING SUCH SUIT—In the recent case of London & Lancashire Indemnity Company of America \(v.\) Duner,\textsuperscript{1} the plaintiff insurance company sued to recover damages resulting from the defendant's alleged wrongful prosecution of a suit in the name of a dissolved corporation. The alleged wrongful suit had been commenced in a state court by a verified complaint which declared that the plaintiff therein was a corporation duly organized and existing by virtue of the laws of the State of Illinois. Defendant herein signed and verified such complaint as president of the corporation. As a matter of fact, the corporation had at one time existed but, more than five years prior to such suit, it had been dissolved.\textsuperscript{2} Such fact was, however, unknown to the present plaintiff, defendant therein, and it removed the cause to the federal court which dismissed the action on other grounds.\textsuperscript{3} Upon discovering the fact of such dissolution, the insurance company instituted the present action to secure reimbursement for the expenses thus incurred, but the trial court found in defendant's favor. On appeal, this judgment was reversed with directions to enter one in favor of plaintiff.

The question presented has but few parallels in the decisions of other jurisdictions and is of particular interest in Illinois as it has not been the subject of prior determination in this state.\textsuperscript{4} Under the common law, the gist of such an action would have been malice and want of probable cause.\textsuperscript{5} But later cases in other jurisdictions have decided that an individual who brings an unauthorized action,\textsuperscript{6} perfects an unauthor-


\textsuperscript{1} 135 F. (2d) 895, 146 A. L. R. 1119 (1943). Evans, C. J., concurred in the result but expressed the belief that had scienter been lacking he would have held in defendant's favor.

\textsuperscript{2} 135 F. (2d) 895 at 897. By statute, suits by or against the dissolved corporation may be conducted if instituted within two years after dissolution has occurred, but not thereafter: Ill. Rev. Stat. 1943, Ch. 32, §157.94.


\textsuperscript{4} The Illinois cases referred to by the court were recognized as not being directly in point, for one, Dawson \textit{v.} Ellis, 151 Ill. App. 92 (1909), merely defines a tort, while the other, Philpot \textit{v.} Taylor, 75 Ill. 309, 20 Am. Rep. 241 (1874), distinguished on the facts, based its result upon fraud as being the primary wrongful act on defendant's part.


\textsuperscript{6} Moulton \textit{v.} Lowe, 32 Me. 466 (1851).
ized appeal,\textsuperscript{7} makes an unauthorized arrest,\textsuperscript{8} or levies an unauthorized attachment\textsuperscript{9} is liable to the defendant for the trouble and expense caused the latter solely because of lack of authority. Furthermore, in one state, the matter has even been made the basis of a statute which, to prevent vexatious litigation, allows a recovery of damages against one suing in the name of another without right.\textsuperscript{10} It would seem, therefore, that the elements of malice and want of probable cause have been deleted, particularly in actions involving a lack of authority on the part of the one using the name of plaintiff.

It might appear that defendant's position, as director and president of his corporation, should give him the right to sue on obligations owing to the corporation so long as he has no knowledge of its dissolution. Certainly, in such a case, malice could not be inferred and would probably be absent. The court, however, disposed of this point in clear language that as the right to sue, which at one time had existed, was ended two years after corporate dissolution, there was, therefore, no entity of any kind in existence which could grant authority either directly or by ratification. Necessarily, therefore, defendant had taken an improper liberty in using the name of another in prosecuting the earlier suit. Defendant further argued that, as a corporate agent acting within the scope of his authority, he should not be affected by the subsequent death or dissolution of the principal without his knowledge. While the court assumed that, as a general rule, an agent is not liable on a contract executed on behalf of a principal without knowledge of the death of the latter,\textsuperscript{11} it dismissed such argument on the ground that the action was one in tort while the rule was applicable only to suits on contracts. It would seem then that defendant's activity in maintaining the original suit was entirely without warrant and his ignorance of the fact of dissolution was utterly inexcusable. The actual outcome of the case is, therefore, undoubtedly the correct one.

Left unanswered, however, is the question as to the proper method which defendant should have pursued to vindicate the original claim of his corporation, assuming there was one, without exposing himself to

\textsuperscript{7} Hawes v. Dunlop, 121 N. Y. S. 380 (1910); Streeper v. Ferris, 64 Tex. 12 (1885).
\textsuperscript{8} Smith v. Hyndman, 64 Mass. (10 Cush.) 554 (1852).
\textsuperscript{9} Bond v. Chapin, 49 Mass. (6 Metc.) 31 (1844).
\textsuperscript{10} Civil Rights Law (1909), §§70-1; Thompson's Laws N. Y. (1939), Ch. 6, §§70-1, p. 252. Such statute, however, has been construed not to apply to a mistaken appeal by a widow, in her own name, to review an order declaring her deceased husband an incompetent at the suit of a relative. The court, in Hawes v. Dunlop, 121 N. Y. S. 380 (1910), deemed such situation as not being within the contemplation of the statute.
liability. Upon dissolution and expiration of the statutory period, corporate claims and property rights do not vanish. If no liquidation proceedings are undertaken, the property and other rights of the enterprise fall upon the shareholders as tenants in common, subject to the rights of any unpaid creditors. In that capacity, and upon proper disclosure of the facts, defendant and his co-shareholders would have been justified in proceeding to liquidate the defunct corporation's assets for the purpose of distribution. As the holders of the right of action, no question could have been advanced against that suit, and litigation such as that in the instant case would then have been made unnecessary.

A. M. Ludwig

12 Fletcher, Cyclopedia of the Law of Private Corporations (Perm. Ed. 1942), Vol. 16, §8130, p. 871. The rule may have been different at common law, Life Association of America v. Fassett, 102 Ill. 315 (1882), but the more modern view is as stated in the texts: Danville Seminary v. Mott, 136 Ill. 289, 28 N. E. 54 (1891).

