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est within the provisions of section 9-307(2). In counselling the secured party, one must assess the risk of being defeated by such a purchaser, against the economics and efficiency inherent in perfection without filing. In balancing the equities between the two innocent parties one must ask how much risk must the secured party assume in order to enjoy the convenience of automatic perfection. With regard to automatic perfection, the UCC has imposed a maximum limit of $2,500 on the purchase of farm equipment and thirteen states have limited this further.[23] Three states have imposed a maximum dollar limitation on consumer goods,[24] and four states have deleted the provisions of section 9-307(2) entirely.[25] These statistics exhibit the tendency of the legislatures to lessen the risk assumed by the secured party as the price for automatic perfection.

The *Shawmut* case intended to minimize the risk of the secured party being defeated by execution purchasers generally. From the foregoing analysis, it is quite apparent that there is no sound basis for excluding stranger purchasers from the protection of section 9-307(2). The defendant execution purchaser was a judgment creditor and not a stranger, therefore the reasoning of the *Shawmut* court is mere dictum with regard to stranger purchasers. It is the writer's hope that such reasoning ultimately remain dictum and that courts in the future will distinguish between these classes of purchasers, and allow stranger purchasers the protection of section 9-307(2).

Paul Episcope

[23] UCC REP. SERV. (State Correlation, 1967): Colorado, Indiana, Iowa, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, Ohio, Rhode Island, Vermont, Virginia, Wisconsin.

[24] UCC REP. SERV. (State Correlation, 1967): Colorado, Maryland, Rhode Island (Maine deleted consumer goods generally).

[25] UCC REP. SERV. (State Correlation, 1967): California, Kansas, Oklahoma, Tennessee.

WRONGFUL DEATH—SURVIVAL OF ACTION AFTER DEATH OF SOLE BENEFICIARY

James McDaniel with his wife and daughter died as a result of injuries sustained in a four car collision. A wrongful death action was begun on behalf of Yvonne McDaniel, the infant next of kin of the decedents, seeking damages for their death allegedly caused by the negligent acts of the defendants. Some nine and one-half months after the accident, and while the suit was pending in her behalf as sole beneficiary, Yvonne died from causes unrelated thereto. The trial court granted the defendants' motion dismissing the action on the grounds that the wrongful death action abated upon the

death of the sole beneficiary. The Supreme Court of Illinois reversed and allowed the beneficiary who later died of an unrelated cause to recover for loss of support. *McDaniel v. Bullard*, 34 Ill. 2d 487, 216 N.E.2d 140 (1966).

Although the Illinois legislature has passed various survival and wrongful death statutes, and although the Illinois courts have had to consider other similar cases, there is little established law relating to the question presented in the *McDaniel* case. The issue here is whether a pending action under the Illinois Wrongful Death Act abates upon the death, from completely unrelated causes, of the sole beneficiary of such action. The purpose of this note is to examine this issue in view of statutory and case law and to determine the trends concerning this issue in various other jurisdictions.

Under early common law, there was no civil remedy for the killing of one human being by another, for as it has been often stated, a personal action for damages died with the person.[1] In fact "it was more profitable for the defendant to kill the plaintiff than to scratch him."[2] To correct this wrong, Lord Campbell's Act was passed in England in 1846 which for the first time permitted a wrongful death action to be brought for the benefit of the wife, husband, parent, and child of the person whose death was caused by the wrongful or negligent act of the defendant.[3] Since then, the majority of jurisdictions in the United States have adopted in their own statutes the essence and meaning of Lord Campbell's Act, and therefore, in the majority of jurisdictions, wrongful death actions are maintainable for the benefit of those who suffer damages through the wrongful death of their next of kin.[4]

Illinois has enacted an extensive Wrongful Death Act[5] which has been

[1] Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239 (1929).

[2] PROSSER, TORTS, § 105 (2d ed. 1955).

[3] 9 & 10 Vict. c. 93.

[4] *E.g.*, CAL. CIVIL CODE § 956 (1957); MICH. STAT. ANN. § 27A.2921-22 (1962); VA. W. D. STAT. §§ 8-633 to -634 (1957).

[5] ILL. REV. STAT. ch. 70, §§ 1, 2 (1965): "1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and, except as otherwise hereinafter provided, the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person . . . ."

extended to cover causes of action[6] in addition to those which survived at common law. In addition to this, the Constitution of the State of Illinois provides that "every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation. . . ."[7]

Wrongful death actions are maintainable for the benefit of a class of beneficiaries designated by statute. The defense in the *McDaniel* case bases its contentions on the law expounded in 1928 in Illinois in the case of *Wilcox v. Bierd*,[8] in which the decedent was survived by his infant daughter by only thirty minutes. The court in that case stated that as a wrongful death action is purely statutory and is not an action for injuries to the person, to personal property or to real estate, the action does not survive but abates upon the death of the party for whose benefit it is brought.[9]

Another closely related and important case, decided in Ohio in 1954, is *Danis v. N.Y. Cent. R.R.*[10] There the sister of the decedent, and the only statutory beneficiary in the wrongful death action, died during the pendency of the case before the court. The court held that an action for wrongful death may not be maintained where, during the pendency thereof, the only heir and next of kin of the decedent who sustained pecuniary injury by reason of the death dies, since no one remains within the purview of the death statute in whose behalf the action may be further prosecuted.[11] The court continued by stating that the maintainance of the action was precluded by the statute creating the right of action for the exclusive benefit of the decedent's surviving spouse, children and other next of kin who suffer pecuniary injury from the death.[12]

The determining factor involved in the survival of a wrongful death action to the estate of the deceased beneficiary is whether such action is an action to recover damages to personal property as allowed by Illinois statute.[13] Since 1928, under the guiding principles of *Wilcox v. Bierd*,[14] a survival action has

[6] ILL. REV. STAT. ch. 3, § 339 (1965): "In addition to the actions which survived by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property . . . ."

[7] ILL. CONST. art. II, § 19.

[8] Wilcox v. Bierd, 330 Ill. 571, 162 N.E. 170 (1928).

[9] *Id.* at 586, 162 N.E. at 176.

[10] Danis v. N.Y. Cent. R.R., 160 Ohio St. 474, 117 N.E.2d 39 (1954).

[11] *See* Annot., 43 A.L.R.2d 1286 (1955).

[12] *Supra* note 10, at 476, 117 N.E.2d at 40.

[13] ILL. REV. STAT. ch. 3, § 339 (1965).

[14] *Supra* note 8.

been allowed only to recover damages to tangible property, *i.e.* physical property that can be seen, handled or moved.[15] As was stated in the *Wilcox* case:

> It is not a suit to recover damages to personal property or to real estate within the meaning of the survival act, but is a suit to recover for a loss of the increase in money value to the estate of the deceased, which the deceased would in all probability have made had he lived, for the benefit and use of his widow and next of kin. It may be said to be a suit for recovery of damage or loss to a property right in its most general sense, but it is not a suit to recover loss to personal or real property and is not assignable under the previous holdings of this court.[16]

Many other jurisdictions have continued to follow the traditional view of the *Wilcox* case. In 1956 in the case of *Deeg v. City of Detroit*,[17] where a suit was brought for damages for causing a post-mortem examination of the plaintiff's husband without her consent, and during the pendency of such suit the plaintiff died, the Michigan court held that the cause of action did not survive the plaintiff's death. The court went on to say:

> It ceased to exist at that time and, in consequence, was not subject to being revived and prosecuted by the administrator of her estate. The right that the defendant was charged with having violated was purely personal in character. It did not involve an injury to person or to property within the meaning of the provisions of the statute . . . relating to the survival of rights of action, and it was not of such character as to survive at common law.[18]

A similar result was reached in 1939 in Louisiana in the case of *Hardtner v. Aetna Cas. & Sur. Co.*[19] where the widow of the decedent died after commencing a wrongful death action for the death of her husband. The court here held that the action for damages could not be continued by her heirs since the recovery of damages for the husband's death was personal, did not survive her death, and was not capable of being transmitted to her heirs.[20]

Although *Wilcox* represents the traditional view, there is emerging in the law in many jurisdictions a contrary theory to the effect that the action does not abate upon the death of the sole beneficiary. Such was the holding of the court in *Van Beeck v. Sabine Towing Co.*[21] wherein the court stated:

[15] Shedd v. Patterson, 312 Ill. 371, 144 N.E. 5 (1924).

[16] *Supra* note 8, at 586, 162 N.E. at 176.

[17] 345 Mich. 371, 76 N.W.2d 16 (1956).

[18] *Id.* at 379, 76 N.W.2d at 20.

[19] 189 So. 365 (La. 1939).

[20] *Id.* *See* Cummins v. Kansas City Public Serv. Co., 334 Mo. 672 (1933); Walsh v. Bressette, 51 R.I. 354, 155 A. 1 (1931); Rogers v. Ft. Worth & D.C.R.R., 91 S.W.2d 458 (Tex. 1936).

[21] 300 U.S. 342 (1937).

When we remember that under the death statutes an independent cause of action is created in favor of the beneficiaries for their pecuniary damages, the conclusion is not difficult that the cause of action once accrued is not divested or extinguished by the death of one or more of the beneficiaries thereafter, but survives, like a cause of action for injury to a property right or interest, to the extent that the estate of the deceased beneficiary is proved to be impaired.[22]

Along with this view, the courts in the more modern holdings have stated that the wrongful death and survival statutes, such as have been enacted in Illinois, are to be liberally construed.[23] Indeed, the *McDaniel* case follows this trend in the law by moving away from the strict holding in *Wilcox* towards a more liberal view stating that the action does not abate. Therefore, there is no reason why an estate that has been injured or depleted by the wrong of another should not be compensated, whether the injured party is living or not. A similar holding was reached in 1962 in California in the case of *Johnson v. Key Sys. Transit Lines*[24] where the mother, as sole heir of their decedent, filed a wrongful death action for her son's death as a result of a collision between her son's car and the defendant's train. The court in that case held that the cause of action for wrongful death necessarily resulted from physical injury to the decedent in his life time, and therefore, under the statute, the cause of action survives the death of the plaintiff and vests itself in her heir, the person who owns the cause of action.[25] A similar result was reached in Virginia in 1957 in the case of *Johns v. Blue Ridge Transfer Co.*[26] where plaintiff's decedent, an infant, was killed when the automobile in which he was riding with his parents collided with defendant's truck. His father died in the accident and his mother survived for only a few hours. The defendant moved for a dismissal of the action on the theory that since the mother was the sole beneficiary of the infant, that any right of action abated upon her death. The court in that case stated that:

[T]he statute is remedial and should be liberally construed so as to accomplish its object . . . [and therefore] we think it would be too narrow a construction of the statute to hold that an action thereunder could abate as long as any beneficiary person or class named in the statute existed.[27]

Here the beneficiary under the statute was the estate of the decedent. In

[22] *Id.* at 348.

[23] Northern Trust Co. v. Palmer, 171 Ill. 383, 49 N.E. 553 (1898); Devine v. Healy, 241 Ill. 34, 89 N.E. 251 (1909).

[24] 210 Cal. App. 2d 440, 26 Cal. Rptr. 574 (1962).

[25] *Id.* at 440; 26 Cal. Rptr. at 475.

[26] 199 Va. 63, 97 S.E.2d 723 (1957).

[27] *Id.* at 67, 97 S.E.2d at 726 (1957).

addition to the above cases, there are many other jurisdictions which follow the theory expounded in the *McDaniel* case.[28]

One additional factor must be considered to determine the effectiveness of the *McDaniel* decision. After that decision was rendered in July, 1966, the Appellate Court of Illinois was faced with a similar situation in the case of *Butterman v. Chamales*.[29] The appellate court rendered its decision in that case seemingly in disregard or without knowledge of the *McDaniel* decision. In holding that an action for an attorney's negligence cannot be maintained against the attorney's estate upon the death of the attorney, the court regressed to the older Illinois view by holding that an action to recover damages for an injury to personal property within the meaning of the Illinois statutes applies only to actions for damages to tangible articles and things moveable.[30] This decision seems to indicate the appellate court's unwillingness to give the Illinois statutes the liberal interpretation required by the *McDaniel* case.

The decision in *McDaniel v. Bullard* places Illinois among those many jurisdictions giving a more liberal interpretation to the strict common law rules relating to wrongful death actions. This truly is consistent with the modern procedural trends allowing a case between a wronged plaintiff and a wrongful defendant to be decided on the merits rather than on a legal and sometimes blind technicality. Despite the *Butterman* decision, *McDaniel* is the law in Illinois today, and as it is consistent with the law in the majority of jurisdictions in the United States, its effect will give a much needed remedy to a very serious wrong.

Dennis Buyer

[28] Roadway Express, Inc. v. Jackson, 77 Ga. App. 341, 48 S.E.2d 691 (1948); Wabash R.R. v. Gretzinger, 182 Ind. 155, 104 N.E. 69 (1914); Keele v. Atchison T. & S.F. R.R., 151 Mo. App. 364, 131 S.W. 730 (1910); Thomas v. Maysville Gas Co., 112 Ky. 569, 66 S.W. 398 (1902); Dostie v. Lewiston Crushed Stone Co., 136 Me. 284, 8 A.2d 393 (1939); Cibulla v. Pennsylvania-Reading Seashore Lines, 25 N.J. Misc. 98, 50 A.2d 461 (1946); Frampton v. Santa Fe N.W. R.R., 34 N.M. 660, 287 P. 694 (1930); Mella v. Northern S.S. Co., 127 F. 416 (1903); Shawnee v. Cheek, 41 Okla. 227, 137 Pac. 724 (1913); Milyak v. Philadelphia Rural Transit Co., 300 Pa. 457, 150 A. 622 (1930); Lones v. McFall, 152 Tenn. 239, 276 S.W. 866 (1925).

[29] 73 Ill. App. 2d 399, 220 N.E.2d 81 (1966).

[30] *Id.*