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## Torts -- Negligence -- Automobiles -- Owner's Liability After Leaving Ignition Key in Lock

Bailey Patrick Jr.

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cases.<sup>13</sup> In other words, the result of the transaction in form looks like a capital gain while in substance it is not.

A quote from the dissent in the *Phillips* case illustrates the need for a judicial yardstick: "The conclusion which in my opinion cannot be escaped here might be different where a policy was not about to mature, or did not have a cash surrender value in an amount close to the full value at maturity, and where the taxpayer could recover his investment only through a sale to a third party."<sup>14</sup> The court in *Arnfield* also recognized this need when it aptly stated that "the law holds no certainty in this area."<sup>15</sup>

Thus by judicial admission a denial of capital gain benefits in this area is obviously left to a case by case determination, leaving no definite boundaries set for taxpayer to follow. Since the stakes are often worth the gambling, taxpayers do invent technical property devices in an effort to save taxes. Therefore it is urged that legislation be enacted whereby taxpayer will be accorded identical treatment on the proceeds of the policy whether they be obtained from a "bona fide sale or exchange" or surrender to the company. At present this area is merely a trap for the unwary.

RICHARD B. HART

### Torts—Negligence—Automobiles—Owner's Liability After Leaving Ignition Key in Lock

The recent case of *Williams v. Mickens*<sup>1</sup> presented a question of first impression in North Carolina. The defendant parked his automobile on a public street with the key in the ignition switch and left it unattended. The automobile was subsequently stolen, and shortly thereafter was involved in a collision with the plaintiff caused by the negligence of the thief. The plaintiff sued defendant for his negligence in leaving the key in the ignition on the theory that defendant should have foreseen that a thief might steal the automobile and drive it negligently. Since there was no statute involved, the court decided the case on common law principles. The trial court granted defendant's motion for nonsuit and the supreme court affirmed. Relying on the case of *Ward v. Southern Ry.*,<sup>2</sup> the court said that, while they were not willing to admit

<sup>13</sup> Cases cited note 9 *supra*.

<sup>14</sup> P-H 1958 T.C. Rep. Dec. ¶ 30.87 at 502.

<sup>15</sup> CCH 1958 STAND. FED. TAX REP. ¶ 9692 at 151.

<sup>1</sup> 247 N.C. 262, 100 S.E.2d 511 (1957).

<sup>2</sup> 206 N.C. 530, 174 S.E. 443 (1934). (Plaintiff was killed when struck by a piece of coal thrown from defendant's car; held, assuming defendant was negligent in allowing thieves to be on the train, nevertheless, the plaintiff cannot recover since the intervening criminal assault was unforeseeable.)

that defendant's act of leaving the keys in the switch was negligent, even if such were the case, to allow recovery would do violence to the rule of proximate cause as understood and applied in this jurisdiction.<sup>3</sup> Thus the court was reaffirming its position taken in previous cases<sup>4</sup> that if between the defendant's negligent act and plaintiff's injury, there is an intervening criminal act by a third person producing the injury, and such act was not intended by the defendant and could not have been reasonably foreseen by him, the causal chain between the original negligence and the accident is broken and the defendant's act of negligence is not the proximate cause of the plaintiff's injury.

Most jurisdictions have refused to hold the car owner liable in "key-theft" cases similar to the principal case. The cases fall into two general classes: those not involving a statute or ordinance which expressly prohibits the owner or operator of a motor vehicle from leaving his key in the ignition when the vehicle is left unattended,<sup>5</sup> and those in which such a statute is involved.

*At common law.* In a majority of the cases arising in jurisdictions where there is no applicable statute the plaintiff has been denied recovery as a matter of law.<sup>6</sup> Various theories for such holdings have been advanced by the courts: (1) the defendant owes no duty to the plaintiff absent actual knowledge of the presence of thieves or some other circumstance that might reasonably indicate a foreseeable risk of harm to the plaintiff;<sup>7</sup> (2) leaving the key in the ignition was not a negligent

<sup>3</sup> Foreseeability of injury is a test of proximate cause. See, e.g., *McNair v. Richardson*, 244 N.C. 65, 92 S.E.2d 459 (1956); *Welling v. Charlotte*, 241 N.C. 312, 85 S.E.2d 379 (1955); *Boone v. North Carolina R.R.*, 240 N.C. 152, 81 S.E.2d 380 (1954).

<sup>4</sup> *Ward v. Southern Ry.*, 206 N.C. 530, 174 S.E. 443 (1934); *Chancey v. Norfolk & Western Ry.*, 174 N.C. 351, 93 S.E. 834 (1917); see also Note, 29 N.C.L. Rev. 210 (1951).

<sup>5</sup> An example of such a statute is this District of Columbia traffic regulation: "Every motor vehicle shall be equipped with a lock to lock the starting lever, throttle, switch, or gear shift lever, by which the vehicle is set in motion, and no person shall allow any motor vehicle operated by him to stand unattended on any street or in any public place without first having locked the lever, throttle, or switch by which said vehicle may be set in motion." TRAFFIC AND MOTOR VEHICLE REGULATIONS FOR THE DISTRICT OF COLUMBIA § 58.

A statute of this type has no application when the automobile is parked on private property or on a private drive. *R. W. Claxton, Inc. v. Schaff*, 169 F.2d 303 (D.C. Cir. 1948), cert. denied, 335 U.S. 871 (1948).

<sup>6</sup> *Bennett v. Arctic Insulation, Inc.*, 253 F.2d 652 (9th Cir. 1958); *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954); *Midkiff v. Watkins*, 52 So. 2d 573 (La. App. 1951); *Curtis v. Jacobson*, 142 Me. 351, 54 A.2d 520 (1947); *Gower v. Lamb*, 282 S.W.2d 867 (Mo. App. 1955); *Reti v. Vaniska, Inc.*, 14 N.J. Super. 94, 81 A.2d 377 (L. 1951); *Lotito v. Kyriacus*, 272 App. Div. 635, 74 N.Y.S.2d 599 (4th Dept. 1947), aff'd, 297 N.Y. 1027, 80 N.E.2d 542 (1948); *Wagner v. Arthur*, 73 Ohio L. Abs. 16, 134 N.E.2d 409 (1956); *Teague v. Pritchard*, 38 Tenn. App. 686, 279 S.W.2d 706 (1954).

<sup>7</sup> *Bennett v. Arctic Insulation, Inc.*, supra note 6; *Richards v. Stanley*, supra note 6; *Gower v. Lamb*, supra note 6.

act;<sup>8</sup> (3) assuming the defendant negligent, still the intervening criminal act was sufficient to insulate the defendant's negligence and establish the intervening cause as the efficient or proximate cause of the accident.<sup>9</sup> In at least one jurisdiction it was held that the questions of negligence and proximate cause should be submitted to the jury, on the ground that reasonable men might differ under the circumstances of the case.<sup>10</sup>

*Violation of a statute.* When statutes have been involved in the "key-theft" cases the courts have been less consistent in their holdings. Perhaps a majority of the courts have held the defendant car owner not liable.<sup>11</sup> In so holding, the courts have said: (1) the purpose of the statute "was largely for the protection of the car owners themselves and as an aid in proper law enforcement in the discouragement of theft and pilferage";<sup>12</sup> (2) the statute expressly stated that it was not applicable in a civil action;<sup>13</sup> (3) even though the defendant was negligent in violating the statute, nevertheless the negligent driving of the thief was an intervening act which caused the accident and superseded the original negligence of the defendant car owner.<sup>14</sup> On the other hand, there is a strong minority view to the effect that the violation of the statute by the defendant warrants the submission of the facts to the jury.<sup>15</sup> These courts have reasoned that the statute was passed as a public safety measure, not as a crime deterrent, and its violation is either treated as prima facie evidence of negligence<sup>16</sup> or as constituting negligence per se;<sup>17</sup> in either case the question of proximate cause is

<sup>8</sup> *Midkiff v. Watkins*, 52 So. 2d 573 (La. App. 1951).

<sup>9</sup> *Curtis v. Jacobson*, 142 Me. 351, 54 A.2d 520 (1947); *Reti v. Vaniska, Inc.*, 14 N.J. Super. 94, 81 A.2d 377 (L. 1951); *Lotito v. Kyriacus*, 272 App. Div. 635, 74 N.Y.S.2d 599 (4th Dept. 1947), *aff'd*, 297 N.Y. 1027, 80 N.E.2d 542 (1948); *Wagner v. Arthur*, 73 Ohio L. Abs. 16, 134 N.E.2d 409 (1956).

<sup>10</sup> *R. W. Claxton, Inc., v. Schaff*, 169 F.2d 303 (D.C. Cir. 1948), *cert. denied*, 335 U.S. 871 (1948); *Eesley v. Dottellis*, 61 A.2d 564 (D.C. Munic. Ct. 1948); *Bullock v. Dahlstrom*, 46 A.2d 370 (D.C. Munic. Ct. 1946). (The statute was not applicable in these cases. See note 5 *supra*.)

<sup>11</sup> *Frank v. Ralston*, 145 F. Supp. 294 (W.D. Ky. 1956); *Kiste v. Red Cab, Inc.*, 122 Ind. App. 587, 106 N.E.2d 395 (1952); *Galbraith v. Levin*, 323 Mass. 255, 81 N.E.2d 560 (1948); *Anderson v. Theisin*, 231 Minn. 369, 43 N.W.2d 272 (1950); *Permenter v. Milner Chevrolet Co.*, 91 So. 2d 243 (Miss. 1956).

<sup>12</sup> *Anderson v. Theisin*, 231 Minn. 369, 371, 43 N.W.2d 272, 273 (1950).

<sup>13</sup> *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954); *Gower v. Lamb*, 282 S.W.2d 867 (Mo. App. 1955).

<sup>14</sup> *Kiste v. Red Cab, Inc.*, 122 Ind. App. 587, 106 N.E.2d 395 (1952); *Galbraith v. Levin*, 323 Mass. 255, 81 N.E.2d 560 (1948); *Permenter v. Milner Chevrolet Co.*, 91 So. 2d 243 (Miss. 1956).

<sup>15</sup> *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E.2d 74, 51 A.L.R.2d 624 (1954); *Garbo v. Walker*, 57 Ohio Op. 363, 71 Ohio L. Abs. 368, 129 N.E.2d 537 (1955).

<sup>16</sup> *Ney v. Yellow Cab Co.*, *supra* note 15.

<sup>17</sup> *Garbo v. Walker*, 57 Ohio Op. 363, 71 Ohio L. Abs. 368, 129 N.E.2d 537 (1955).

for the jury.<sup>18</sup> Still a third view is that violation of the statute is a legal or proximate cause of the harm as a matter of law and the case should not go to the jury.<sup>19</sup>

The court in the principal case indicates the difficulty that would arise were the defendant car owner in the "key-theft" cases held liable. The court said:

If the owner is liable for injury inflicted by the thief at the next street crossing, there appears no reason why liability should not extend to the next town, the next county, or the next state. If leaving the key in the switch creates liability, leaving it on the seat, or on the owner's desk where a thief could easily find it, would seem also to imply liability. If liability exists on the day of the theft, does it not continue to the next day, and the next? Surely, ownership of a motor vehicle does not involve such hazard.<sup>20</sup>

Further insight into the "key-theft" cases may be gained by an appraisal of the risks which the car owner creates by leaving his key in the ignition. In so doing, he does not assume that it will be driven. At most he creates the *risk* that it will be stolen and driven. By comparison, one who lends his car to another obviously *knows* that his car will be driven. In the "key-theft" case the risk that the car will be stolen—and by a thief who is a negligent driver—is materially less than the risk involved where an owner entrusts his car to another for the very purpose of being driven. The North Carolina court, however, has held that a bailor is not liable for a bailee's negligent driving.<sup>21</sup> There seems to be no logical reason for holding the owner liable in the "key-theft" cases when by analogy he has created a lesser risk that the

<sup>18</sup> *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E.2d 74, 51 A.L.R.2d 624 (1954); *Garbo v. Walker*, *supra* note 17.

<sup>19</sup> *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944). The *Ross* case overruled *Squires v. Brooks*, 44 App. D.C. 320 (D.C. Cir. 1916), where the court held, on facts essentially similar and under a similar ordinance, that the defendant's negligence was not the proximate cause of the plaintiff's injury. The District of Columbia, however, has recognized that some limit must be placed on the car owner's liability. In *Howard v. Swagart*, 161 F.2d 651 (D.C. Cir. 1947), the thief, some twelve hours after the theft, allowed another person to borrow the car. This person negligently collided with the plaintiff's car. The court, holding for the defendant car owner, stated, "It cannot fairly be said that this court meant, by the *Ross* and *Schaff* decisions, to impose liability on the owner . . . of an unlocked car for the negligent action of every person, other than the thief, driving it subsequent to the theft." *Id.* at 655. See also *Casey v. Corson and Gruman Co.*, 221 F.2d 51 (D.C. Cir. 1955), where the court held that the defendant's negligence in leaving his car in a private parking lot in the District of Columbia with the keys in the ignition was too remote in time, place, and circumstances to have been a proximate cause of a collision taking place in Petersburg, Virginia, in which the plaintiff was injured by the thief's negligent driving of the defendant's car. (The ordinance was not applicable.)

<sup>20</sup> 247 N.C. at 263, 100 S.E.2d at 513.

<sup>21</sup> *Reich v. Cone*, 180 N.C. 267, 104 S.E. 530 (1920).

car will be driven negligently than has a person who lends his car to another.<sup>22</sup>

The test of foreseeability has been a big factor in all of these cases.<sup>23</sup> It is conceded that there may be circumstances which make foreseeable the possibility of harm resulting from leaving keys in a parked car.<sup>24</sup> However, such circumstances are not usually present. There is usually no evidence from which a jury could properly infer that the defendant car owner could foresee that the thief would steal the car and drive it negligently.<sup>25</sup> It is admitted that by leaving the keys in the ignition lock of the automobile one increases the risk of theft and that in certain circumstances this might be held to have been foreseeable as a matter of law, but can it be said that it is foreseeable that a thief will be negligent?<sup>26</sup> Absent a statute that expressly states that the defendant car owner in this type case is to be held liable for the thief's negligence or some special circumstance which would put the owner on notice, there would seem to be no justification for holding him liable.<sup>27</sup>

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<sup>22</sup> *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954).

<sup>23</sup> An example of the conflict in the courts as to what is foreseeable is shown by the following inconsistent statements made by the Illinois appellate courts: "[The defendant car owner] is required by all rules of common sense and reason to know that a thief, in his effort to escape from the scene of the theft, may have no greater regard for traffic lights or traffic regulations than he had for the criminal statute making it a felony to steal the car." *Ostergard v. Frisch*, 333 Ill. App. 359, 368, 77 N.E.2d 537, 541 (1948); "It would seem reasonable that a car thief, in order to avoid attracting attention and arrest, would be meticulous in observing traffic laws such as speeding, running stop lights, etc." *Cockrell v. Sullivan*, 344 Ill. App. 620, 624, 101 N.E.2d 878, 879 (1951). In *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E.2d 74, 51 A.L.R.2d 624 (1954), the Illinois Supreme Court settled the question by adopting the rule of the *Ostergard* case.

<sup>24</sup> Leaving the automobile illegally parked in such condition as would render it dangerous to children who are known by the owner to be exposed to the hazard, *Campbell v. Model Steam Laundry*, 190 N.C. 649, 130 S.E. 638 (1925); leaving an intoxicated person in an automobile with the keys in the ignition, *Morris v. Bolling*, 31 Tenn. App. 577, 218 S.W.2d 754 (1948); *Pfaehler v. Ten Cent Taxi Co.*, 198 S.C. 476, 18 S.E.2d 331 (1942).

<sup>25</sup> The New York Appellate Division held in *Lotito v. Kyriacus*, 272 App. Div. 635, 74 N.Y.S.2d 599 (4th Dept. 1947), that even though car owners, prior to the theft of defendant's car, had been warned through the newspapers and over the radio not to leave their cars unlocked or the keys inside the car because of the commonness of such thefts, still the defendant owed no duty to the plaintiff who had been struck by the defendant's car which was being driven by the thief at the time.

<sup>26</sup> *Kiste v. Red Cab, Inc.*, 122 Ind. App. 587, 596, 106 N.E.2d 395, 399 (1952). "It is our observation that in the absence of clear legislative declaration this result would not ordinarily be reached except where the surrounding circumstances clearly point to both a high probability of intervening crime, and of like pursuant negligent operation of the vehicle by the thief. We do not presume to affirm or deny that such circumstances are highly probable in the District of Columbia or the First District of the Appellate Court of Illinois. We do assert with some satisfaction that such circumstances are not reasonably foreseeable in this jurisdiction."

<sup>27</sup> For additional material on this subject see Annot., 51 A.L.R.2d 633 (1957) and 43 CAL. L. REV. 140 (1955).