pany would provide an efficient method for distributing losses which may be staggering to the individuals upon whom they fall, especially in cases of fire or of death of bread-winners. It is hard to believe that the amount of recovery would significantly affect the resources of telephone companies or even force them to increase their rates. But see 46 Yale L.J. 167, 171–72 (1936). If business losses are held not recoverable, not only because the possible recovery might be very large as suggested above, but also because financial protection of businesses is usually not as necessary as financial protection of individuals and because risk of business loss by delay may be anticipated and often avoided or hedged against, the possible liability should be relatively slight. And the threat of liability may have a tendency to improve telephone service. On the other hand, if liability is imposed, the danger of faked suits is a very real one. See Clay, The Liability of a Telephone Company, 1 Va. L. Rev. 337 (1914) (discussing many cases). The difficulty of producing enough evidence to avoid a directed verdict for the company would be slight, and the likelihood of a favorable verdict from public-utility-conscious juries would be a great temptation. If the court in the principal case implicitly compared the danger of faked suits with the advantages suggested and considered the former more important, its decision should not be criticized.

That the court considered it extremely undesirable to hold against the telephone companies is apparent in its strained construction of the Decedent Estate Law. While the words of § 130 taken out of context seem to lead to the construction adopted it is clear from the whole act that it was intended to create a new category of liability which will reimburse families and dependents for damage sustained by *them* through the loss of the deceased. Cahill's N.Y. Cons. L. 1930, c. 13, § 132 (fixing measure of damages as the injury to the plaintiff); see *Littlewood v. Mayor*, 89 N.Y. 24 (1882) (almost identical death act). The essential distinction between the cause of action provided for and that in favor of the deceased is that the former arises only upon death. Since the death is an undoubted injury to the plaintiffs, it is unreasonable to suppose that the legislature intended to require injury to the decedent in addition to death. *Littlewood v. Mayor*, 89 N.Y. 24 (1882); Tiffany, Death by Wrongful Act § 65 (2d ed. 1913). *Cf.* note on the principal case in 31 Ill. L. Rev. 535 (1936). Statutes which are designed to preserve (in contrast to "create") causes of action which had already arisen before death are known as *survival statutes*. There the defendants are injured only in the sense that the estate is not as large as it would have been if the decreased had recovered for his injury. Confusion of the two types has often been roundly criticized. 80 U. of Pa. L. Rev. 993 (1932); McCormick, Damages 336 (1935); 5 Sutherland, Damages § 1260 (4th ed. by Berryman 1916).

Trusts—Liability of Trustee to Cestuis for Failure to Share Receipts from Common Debtor—[New York].—The plaintiffs were holders of notes issued by a German corporation pursuant to a trust indenture naming the defendant trustee for the benefit of the note-holders. The notes were fully secured by collateral on deposit with the defendant's agency in Germany. German moratorium laws prevented payment by the corporation of the interest and the principal, and made impossible the removal of the collateral to New York. The defendant received a substantial amount of money from the corporation in satisfaction of a major portion of an unsecured debt due to the defendant as a bank. The plaintiffs sued to remove the defendant as trustee and to recover damages for this and other alleged breaches of fiduciary obligation. *Held*, for the plaintiff. The defendant was bound to apportion the money so received between the noteholders and itself. *Starr v. Chase National Bank*, N.Y.L.J., 771–72, Sept. 21, 1936 (N.Y. Sup. Ct.).

This is the first case in which a trustee has ever been required to share *pro rata* receipts from a common debtor when the debt owed him personally was unsecured and the debt owed the trust estate was secured. That a trustee must share the receipts where both debts are unsecured has long been settled. *Scott v. Ray*, 35 Mass. 360 (1836); *Bryant v. Russell*, 40 Mass. 508 (1839). Also where both the trustee and the cestuis hold bonds secured by the same security under the trust indenture and the trustee collects by foreclosure on the security, he likewise must share the proceeds in proportion to the amount invested. *Knickerbocker Trust Co. v. Penacook Mfg. Co.*, 100 Fed. 814 (C.C. N.H. 1900); *Continental & Commercial Tr. & Sav. Bank v. New Orleans Drainage Co.*, 278 Fed. 811 (D.C. La. 1922). But see *Colonial Trust Co's. Appeal*, 241 Pa. 554, 88 Atl. 798 (1913) (trustee allowed to prefer his claim when his share in the security was for a subsequent loan which enhanced the general value of the debtor corporation). The rule requiring apportionment, however, is found only in cases in which both debts are unsecured or in which both are secured by the same security. It is based on the well-recognized principle of trusts that the trustee must not allow his personal interests to conflict with those of the cestuis. 3 Bogert, Trusts and Trustees § 543 (1935); Posner, Liability of the Trustee under the Corporate Indenture, 42 Harv. L. Rev. 198, 239 (1928). No other case has been found in which there was any reason to require apportionment of a trustee who had an unsecured claim, while the debt owed the cestius was secured. It has been held that as long as the security is sufficient the trustee has no power to further protect the claim of the cestuis by enjoining the pledging of other assets by the debtor. *Cent. Trust Co. of New York v. Missouri, K. & T. Ry. Co.*, 247 Fed. 586 (D.C. Mo. 1917). Accordingly the trustee has been allowed to take some of the free assets of the debtor as collateral on an individual claim, and to foreclose upon that collateral before default upon the debt to the trust estate without apportionment to the cestuis. *Conover v. Guaranty Tr. Co.*, 88 N.J.Eq. 450, 102 Atl. 844 (1918), aff'd, 89 N.J.Eq. 584, 106 Atl. 890 (1918). He should, therefore, under similar circumstances be able to receive free assets in direct payment of an individual claim. Even if a deficiency existed after foreclosure on the trust debt the unsecured trustee should not be forced to share with the cestuis to any greater extent than that deficiency, because aside from the deficiency the cestuis are fully protected.

In the present case there was ample collateral existing, but it could not presently be realized upon because the German law did not recognize any default and the authorities would not allow the removal of the collateral to New York. The arguments for an unsecured trustee as against secured cestuis, therefore, do not apply with full force to this case. Since there is no indication of how nor when the collateral can be made available, there seems to be some reason for extending the rule applied to cases in which both debts are unsecured to the situation in which the collateral cannot be presently realized.

If, however, the collateral is made available at some other time, a further difficulty will be presented in determining the relative rights of the trustee and the cestuis. The trustee clearly should be given reimbursement out of the collateral by some equitable device, if it is necessary to the payment of the remainder of his claim, because once the collateral is available the reason for requiring apportionment in the first place is destroyed. If that result can not be reached when the security is finally realized upon, it seems that the decision on this point in the present case places an unfair burden on the trustee. On the other hand, since a court of equity seems to have sufficient latitude of discretion to put the parties in their present position, it ought not to find any real difficulty in giving the trustee a proportionate interest in the collateral, as by subrogating him to some of the rights of the cestuis; or, better, by rendering the original decree in conditional form requiring the cestuis to allow the trustee to share ratably when the collateral is realized. Especially should this be so, if, as in the principal case, the cash received by the trustee was a partial cash payment accepted in full settlement of his claim against the debtor.