RECENT CASES

AUTOMOBILES—DUTY OWED TO LICENSEE—WILFUL INJURY—The plaintiff's daughter had solicited a ride in the defendant's car. The defendant was driving at the rate of forty-five to fifty miles an hour when, in attempting to pass another automobile, he collided with it. His car skidded into a tree and the girl was killed. *Held:* The duty of an operator of a car to a licensee is only to abstain from acts wilfully injurious, and mere fast and reckless driving is not within that class of acts unless the evidence shows that it was done with an intent that injury result. *Rose v. Squires,* 128 Atl. 880 (Sup. Ct. of N. J., 1925). In the Court of Errors and Appeals the judgment was affirmed, but, because no principle of law applicable to the case received the sanction of the majority of the court, as required in New Jersey, no opinion was given. Six judges affirmed for the reason given by the Supreme Court. One judge argued that the defendant, to be liable, did not have to have an intent to injure, but thought that the facts of the case did not show the necessary wilfulness or wantonness. The five dissenting judges thought that the intention to do an act which would probably injure, such as reckless driving, was all that was necessary. *Rose v. Squires,* 133 Atl. 488 (N. J., 1926).

In the majority of jurisdictions the occupant of a car, whether invitee or licensee, is owed a duty of reasonable care.[1] But in New Jersey, by analogy to the duties of owners of real property, the driver is held to owe a licensee only the duty of not wilfully injuring him.[2] Even though it be admitted that the analogy between the duties of an owner of real and personal property is correct,[3] it still seems peculiar that New Jersey should go even farther than the majority of the landowner cases and require an actual intention to injure.[4] The general rule is that a landowner owes a licensee a duty to refrain from active misconduct,[5] *i. e.,* either wilfully or negligently setting some force in motion which would injure the plaintiff.[6] The instant case would hold no liability for negligence, even of the grossest kind. An act cannot be both negligent and wilful.[7] Thus the majority seems logically consistent. The dissenting judges,

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[1] Munson v. Rupker, 148 N. E. 169 (Ind., 1925); Rappaport v. Stockdale, 160 Minn. 78, 199 N. W. 513 (1924); Gluck v. Bedford Co., 195 App. Div. 493, 186 N. Y. Supp. 823 (1st Dept., 1925).

[2] Lutvin v. Dopkus, 94 N. J. L. 64, 108 Atl. 862 (1920); Karas v. Burns Brothers, 94 N. J. L. 59, 110 Atl. 567 (1920).

[3] For the various views taken by courts in the United States on the duties of a car driver to the occupant, see 74 U. OF PA. L. REV. 86 (1925).

[4] The Supreme Court said: "It was never suggested that . . . (the driver) desired or attempted to hurt his passengers. . . . Unless there be a positive intent to do injury to a licensee or trespasser, no legal duty is violated."

[5] Gallagher v. Humphrey, 6 Law T. (N. S.) 684 (Q. B., 1862); Albert v. City of New York, 75 App. Div. 553, 78 N. Y. Supp. 355 (1st Dept., 1902); Kay v. Pa. R. R., 65 Pa. 269 (1870).

[6] See Francis H. Bohlen, *Duty of a Landlord Toward Those Entering His Premises of Their Own Right,* 69 U. OF PA. L. REV. 142, 245 *et seq.* (1921).

[7] Holwerson v. St. Louis, *etc.,* R. R., 157 Mo. 216, 57 S. W. 770 (1900).

"To say that an injury resulted from the negligent and wilful conduct of another is to affirm that the same act is the result of two opposite mental conditions, heedlessness and purpose or design." 29 CYC. 424.

feeling that there should be liability for such reckless disregard of human life, maintain that there can be wilful injury by mere inadvertence. In this view they are not without respectable authority to support them.[8] And, moreover, by their construction of wilfulness, they reach what is submitted to be a much more desirable conclusion. *Quod fieri debet, facile præsumitur.*

BANKRUPTCY—AMENDMENT OF CLAIM—DATE OF VALUATION—A creditor of the bankrupt filed his claim as unsecured, although at the time it was secured by stock, then worthless. Three years later, when the stock had risen sufficiently to cover the debt to him, he attempted to amend his claim as secured, but failed to take steps for allowance of the claim for more than five years, and during the same time resisted a set-off claimed by the bankrupt.[1] The creditor asks the valuation of the stock as of the date of the amendment. *Held:* The amendment of an unsecured to a secured claim is within the discretion of the court and that discretion will not be exercised to permit speculation by a creditor on collateral as security; and that when security has not been sold within a reasonable time, it is to be valued as of the date of the filing of the petition. *Gardener v. Chicago Title & Trust Co.*, 12 Fed. (2d) 426 (C. C. A. 1926).

While the object of the Bankruptcy Act is to close the estate within a year, in certain circumstances the court will, in its discretion, allow amendment of a claim from unsecured to secured, when the equities will not be disturbed and the filing of the unsecured claim has been made by mistake of fact or law.[2] But in the principal case the court refused to grant an amendment where the creditor with full knowledge of the facts filed his claim as unsecured, and three years later attempted to amend, because this would allow him to speculate without danger of loss, and would not close up the estate, and because he did not take steps for five years after the amendment to have his security valued. When an amendment is allowed, there is a theoretical but not practical difficulty as to the title of the security between the date of filing and the date of amending the claim. The court further sustains its judgment against the creditor by holding that the time of valuation of a security is the date of the petition. This seems contrary to the decision in *In re Isaacs*,[3] where the valua-

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[8] 1 THOMPSON, NEGLIGENCE, 722 (2d ed. 1901).

"Some of the cases lay down the doctrine that an entire absence of care for the life, the person or the property of others, such as exhibits a conscious indifference to consequences, makes a case of constructive or legal wilfulness, such as charges the person whose duty it was to exercise care, with the consequences of wilful injury," citing Schumacher v. St. Louis, etc. R. R., 39 Fed. 174 (C. C. Ark. 1889), and Overton v. Indiana, etc., R. R., 1 Ind. App. 436, 27 N. E. 651 (1891). Accord: Rideout v. Winnebago Traction Co., 123 Wis. 297, 101 N. W. 672, 69 L. R. A. 601 (1905).

[1] Gardener v. Chicago Title & Trust Co., 261 U. S. 453 (1923).

[2] *In re* Wilder, 101 Fed. 104 (S. D. N. Y. 1900); *In re* Weaver, 144 Fed. 229 (N. D. Ga. 1904); Ragen v. Forbes, 1 Fed. (2d) 786 (C. C. A. 1924); BLACK, BANKRUPTCY (3d ed. 1922) 1155.

[3] 246 Fed. 820 (C. C. A. 1917); Accord: Steinhardt v. Nat. Park Bank, 120 App. Div. 255, 105 N. Y. Supp. 23 (1st dept. 1907).

tion was as of the date of the conversion, but may with difficulty be distinguished. The principal case must be confined to the one situation where the collateral has not been disposed of according to the terms of the pledge or "by agreement, arbitration, compromise, or litigation as the court may direct."[4] This is in accord with the reasoning of *Sexton v. Dreyfus*,[5] which fixes the date of the filing of the petition as the time when interest ceases to accrue on a secured debt. But if the collateral had been disposed of by the trustee according to the terms of the pledge in a reasonable time, the reasoning of the principal case would not seem to apply, and the valuation would be as of the time of the conversion even though the collateral had greatly risen in value.

BANKRUPTCY—PARTIAL DISCHARGE—FALSE REPRESENTATIONS IN SECURING CREDIT—A petitioner in voluntary bankruptcy had induced a creditor bank by a written, false, financial statement to accept new notes in exchange for notes then due. The creditor bank's agent opposed discharge under § 14b (3) of the *Bankruptcy Act*.[1] *Held:* Sec. 14b (3) bars the discharge only as to the claim of the defrauded creditor. *In re Weitzman*, 11 Fed. (2d) 897, 6 Am. B. R. (N. S.) 428 (N. D. Tex. 1923).

The clause, providing that the applicant shall be discharged unless he has obtained money or property on credit, upon a materially false statement in writing made for that purpose, has frequently been litigated. But with such certainty has it been taken for granted that it was intended to bar discharge completely, that only once previous to the principal case has a bankrupt pressed a court to decide the point. That single instance expressly affirmed the common understanding.[2] A similar problem, whether a creditor other than the one defrauded may press the objection, has invariably been decided adversely to the bankrupt,[3] the decisions being opposed only by dicta.[4] Even these did not question the intention to bar the discharge completely. The authority[5] cited in the principal case is dictum, and it is questionable that this court's interpretation of it was that intended. Remington believes that "the grounds for refusing a bankrupt's discharge should be limited to those acts which tend to deplete the estate and to make the discovery of its true condition difficult"; but he admits the law to be otherwise.[6] It is difficult to support the principal case by precedent, reason, or legislative intent. Discharge is not a right, but a

[4] Bankruptcy Act, 30 Stat. 560 § 57h., U. S. Comp. Stat. (1898) § 9641.

[5] 219 U. S. 339, 345 (1911). Accord, Merrill v. Nat. Bank, 173 U. S. 171 (1898).

[1] 32 Stat. 797 (1903), U. S. Comp. Stat. (1913) § 9598, amending 30 Stat. 550 (1898), U. S. Comp. Stat. (1913) § 9598, and itself amended by 36 Stat. 839 (1910), U. S. Comp. Stat. (1918) § 9598.

[2] *In re* Miller, 192 Fed. 730, 27 Am. B. R. 606 (N. D. Iowa 1912).

[3] *In re* Harr, 143 Fed. 421, 16 Am. B. R. 213 (E. D. Mo. 1906); *In re* Carton, 148 Fed. 63, 17 Am. B. R. 343 (S. D. N. Y. 1906).

[4] Matter of Troutman & Jesse, 251 Fed. 930, 40 Am. B. R. 418 (W. D. Ky. 1917).

[5] *In re* Morgan, 267 Fed. 959, 45 Am. B. R. 612 (C. C. A. 2d, 1920).

[6] 3 REMINGTON, BANKRUPTCY (2d ed. 1915), § 2559.

privilege granted an honest bankrupt.[7] That Congress intended to withhold the privilege from the dishonest bankrupt is doubly shown by an original section of the Act,[8] protecting the defrauded creditor by excepting his claim from the discharge, and by the amendments[9] which have made the clause more potent.

BILLS AND NOTES—ALTERATION OF INSTRUMENTS—INDORSEMENT OF CREDIT—Plaintiff held two promissory notes from the defendants, each note secured by a distinct mortgage. These notes were indorsed by the plaintiff to a bank. Before maturity, defendants made a partial payment on the first of these notes, which payment was indorsed by the bank on the back thereof. Later, the plaintiff being required to take up the notes, he crossed out the credit indorsed on the first note and placed it on the second note, because this second note was not so well secured. *Held:* The erasure of the credit was not a material alteration. *Harrington v. Leighton*, 208 N. W. 219 (S. Dak., 1926).

Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsees.[1] The intent of the party making the alteration is immaterial, the test of materiality being whether or not the alteration makes the instrument express a contract different in legal effect from that which it originally expressed.[2] This view prevails under the *Negotiable Instruments Law*.[3] Courts have attacked this problem by inquiring whether the credit indorsed on the note is a part of the contract evidenced by the note. In some instances, memoranda indorsed on the back of negotiable instruments were held to constitute a part thereof.[4] If the memorandum is on the back of the note when delivered, it is very apt to be so construed.[5] But courts have consistently held that the indorsement of an actual credit on a note is no part of it, and therefore its erasure, even though fraudulent, is not a material alteration of the instrument.[6] The above decision is therefore in accord with the authorities. However, a con-

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[7] COLLIER, BANKRUPTCY (13th ed. 1923) 479, 480; *In re* Harr, *In re* Carton, *supra*, note 3.

[8] 30 Stat. 550 (1898), U. S. Comp. Stat. (1913) § 9601, amended by 32 Stat. 798 (1903), U. S. Comp. Stat. (1913) § 9601, and by 39 Stat. 999 (1917), U. S. Comp. Stat. (1918) § 9601. *Cf.* COLLIER, *op. cit. supra*, note 7, at 550, and Talcott v. Friend, 179 Fed. 676, 24 Am. B. R. 708 (C. C. A. 7th, 1909), *aff'd*, 228 U. S. 27 (1913).

[9] Act of 1910, *supra*, note 1; Act of May 27, 1926, Public, No. 301, 69th Congress (S. 1039).

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[1] N. I. L., § 124.

[2] Benton v. Clemmons, 157 Ala. 658, 47 So. 582 (1908); New York Life Ins. Co. v. Martindale, 75 Kan. 142, 88 Pac. 559 (1907).

[3] Sec. 125; Keller v. State Bank, 292 Ill. 553, 127 N. E. 94 (1920); Washington Finance Corp. v. Glass, 74 Wash. 653, 134 Pac. 480 (1913).

[4] Washington Finance Corp. v. Glass, *supra*, note 3; Mertz v. Fleming, 185 Wis. 58, 200 N. W. 655 (1924).

[5] Heaton v. Ainley, 108 Iowa 112, 78 N. W. 798 (1899); Barnard v. Gushing, 4 Metc. 230 (Mass., 1842).

[6] Bryan v. Dyer, 28 Ill. 188 (1862); Bank v. Hyde, 131 Mass. 77 (1881); Simms v. Paschall, 27 N. C. 276 (1844).

trary decision might have been reached by holding that part payment of the note and its indorsement thereon operated as a proportional discharge of the note. An erasure of the credit, by increasing the negotiability of the instrument, might be considered an alteration of the sum payable. The maker is protected if a holder directly changes the amount.[7] Why should not the maker also be protected if the same result is achieved indirectly, as by erasing a credit indorsed on the instrument?

COPYRIGHT—SUBJECT MATTER—COMPILATIONS OF BROADCASTING PROGRAMS—The plaintiffs, a broadcasting company, published a paper which included the advance daily programs for the ensuing week. These programs gave the day and hour of each performance, the names of the artists, appropriate headings for items and translations of unfamiliar songs. The preparation, arrangement and editing of these programs involved considerable time, skill and expense. The defendants having copied numerous items from one of the issues, the plaintiffs sue for infringement of copyright. *Held:* There is copyright in the programs. *British Broadcasting Co. v. Publishing Co.*, [1926] 1 Ch. 433.

The *British Copyright Act* provides that copyright shall subsist in every "original literary" work,[1] and includes "compilations" under "literary work."[2] In finding that the programs possess literary quality the court follows the decision of an earlier case[3] that "the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high." The decision is based on the compilation of the advance programs rather than on a single one. English courts having held from time to time that there can be copyright in bare lists if they are useful,[4] the court in this case was only obliged to apply settled law to an entirely new set of facts. Substantially the same productions may be copyrighted in the United States as in England. The *United States Copyright Act* provides in very broad language that the works for which copyright may be secured shall include "all the writings of an author."[5] Among the classes mentioned as being entitled to copyright are "books, including . . . directories and other compilations."[6] In one of the latest decisions[7] it is decided that the right to copyright shall not depend on literary skill or on anything more than industrious collection. Earlier cases have held that a compilation comprising lists of race horses was the

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[7] N. I. L., § 125.

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[1] (1911) 1 & 2 Geo. V c. 46 § 1 (1).

[2] *Ibid.*, § 35 (1).

[3] Univ. of London Press v. Univ. Tutorial Press, [1916] 2 Ch. 601.

[4] Collis v. Cater, [1898] 78 L. T. 613 (Chemist's Catalogue of Drugs); Weatherby v. Internat. Horse Agency, [1910] 2 Ch. 297 (Stud Book List of Mares and Stallions).

[5] 35 Stat. 1075 (1909), U. S. Comp. Stat. (1918) § 9520.

[6] *Ibid.*, § 9521.

[7] Publication Co. v. Keystone Co., 281 Fed. 83 (C. C. A. 2d, 1922) (Compilation of Trade Marks).

proper subject of copyright.[8] In view of these facts and the generality and elasticity of the terms used in the statute, it would appear that the programs involved in the principal case would probably be held to come under the protection of the *United States Copyright Law*, should the question arise here.

EASEMENTS—IMPLIED GRANT—APPARENT USER—The plaintiff, the grantee of the dominant tenement, claimed an easement to draw water in buckets from a spring on the servient tenement. The plainitff is the daughter-in-law of her grantor, who originally owned both tenements, and knows that for thirty years prior the inhabitants of the lot granted her have been exercising the user claimed. *Held:* There was no implied grant of an easement. *Kelly v. Nagle*, 132 Atl. 587 (Md. 1926).

There is an implied grant of a quasi easement which is apparent, continuous, and reasonably necessary.[1] "Apparent," in this sense, is generally used to mean capable of being seen or known on careful inspection,[2] but it is not necessary that the easement be actually seen.[3] In other words, a constructive notice, or constructive sight, of a quasi easement has been held sufficient. In the principal case the user left no mark or indication on the servient tenement, nor would its existence be revealed to a prospective purchasr by a careful examination of the land. For these reasons the user was held not to meet the requirement that it be "apparent," although the court found it to be "continuous." The facts tend to the conclusion that here the prospective purchaser, who was the daughter-in-law of the grantor, had actual knowledge of the existence of the quasi easement, and of its use for thirty years previous. This presents an interesting question: Should a purchaser with constructive notice be placed in a better position than a purchaser who at the time of the sale had actual knowledge of the quasi easement? Quasi easements pass by implication, because the courts assume that apparent easements and privileges are taken into consideration when the price is agreed upon, and that the use of them is paid for. And this assumption is a reasonable one. It is submitted, however, that the situation in which the prospective purchaser has actual knowledge of the quasi easement, though it is not apparent, justifies the same assumption. If a grantee is assumed to have paid for the use of a quasi easement because an inspection at the time of the purchase would have revealed it, surely another grantee should be assumed to have paid for a user which he knew existed at the time of the purchase. No case has been found upholding the implied grant of a quasi easement which was not apparent, but it is interesting to note an English case indicating that the surrounding circum-

[8] American Trotting Register v. Gocher, 70 Fed. 237 (C. C. Ohio, 1895); Egbert v. Greenberg, 100 Fed. 447 (C. C. Calif., 1900).

[1] Eliason v. Grove, 85 Md. 215, 36 Atl. 844 (1897); 19 C. J. 914.

[2] Fetters v. Humphreys, 18 N. J. Eq. 260 (1867); Richardson v. Internat. Pottery Co., 63 N. J. L. 48, 43 Atl. 692 (1899); 1 TIFFANY, REAL PROPERTY (1st Ed. 1903) 706.

[3] See Pyer v. Carter, 1 H. & N. 916 (Eng., 1857); Toothe v. Brice, 50 N. J. Eq. 589, 599, 25 Atl. 182, 187, 188 (1892); Larsen v. Petersen, 53 N. J. Eq. 88, 93, 94, 30 Atl. 1094, 1096, 1097 (1895); Lampman v. Milks, 21 N. Y. 505 (1860).

stances known to both parties at the time of the purchase must also be considered in determining whether there is or is not an implied grant.[4] Still another decision recognizes the principle that the reasonable expectation of the grantee, as shown by the circumstances known to him, must be considered in determining the existence of an implied grant.[5]

EVIDENCE—PRESUMPTIONS—LAPSE OF TIME—Independent of the statutes of limitations, it is a principle of the common law, that any debt, due and unclaimed and without recognition for twenty years is presumed to have been paid.[1] The time in some jurisdictions has been reduced to sixteen,[2] fifteen,[3] or ten[4] years. The statute of limitations, which presupposes an established substantive right but forbids its enforcement by the courts, is pleaded as a defence by the defendants. It is a positive rule of law barring the action, to which there is no rebuttal.[5] The presumption of payment arising from lapse of time is drawn from the plaintiff's own case. It is a presumption of law and has this effect: "It *prima facie* obliterates the debt and the onus of proof is upon the creditor, not to establish a new contract, as in the case where a debt is barred by the statute of limitations, but to show that the payment of the debt has not been made."[6] Numerous statutes of limitations have reduced the occasion for invoking the presumption, but it is still applied to those cases where for some reason the statute does not run against a debt.

A lapse of time less than that required by the common law rule of itself never gives rise to the presumption of payment.[7] But where there are other circumstances accompanying such a lapse of time, which tend to show that the debt would, in the ordinary course of human affairs, have been paid—such as the indigent circumstances of the obligee taken together with the easy and solvent circumstances of the obligor—the evidence may be admitted to prove the payment of the debt circumstantially.[8] This evidence does not give rise to a presumption of law. The effect of such evidence is that the jury "is given

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[4] *Cf.* Quicke v. Chapman, [1903] 1 Ch. 659, 671.

[5] B., D., & D. B. Co. v. Ross, 38 Ch. D. 295, 307 (Eng., 1888); Godwin v. Schweppes, [1902] 1 Ch. 926, 933.

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[1] Carpenter v. Tucker, 1 Ch. Rep. 78 (Eng., 1715) (though reported at this late date, was rendered in 1633); Chesapeake & Delaware Canal Co. v. United States, 240 Fed. 903 (C. C. A. 3d, 1917). The presumption is applied against the state as well as the individual; Gilmore v. Alexander, 268 Pa. 415, 112 Atl. 9 (1920); 70 U. OF PA. L. REV. 30 (1922); collected cases in note to 66 Am. St. Rep. 879 (1898).

[2] Atkinson v. Dance, 9 Yerg. 424 (Tenn. 1826).

[3] Smith v. Niagara Ins. Co., 60 Vt. 682, 15 Atl. 353 (1888).

[4] Hall v. Gibbs, 87 N. C. 4 (1882).

[5] Chesapeake & Delaware Canal Co. v. United States, *supra*, note 1, at 908: "When the statute of limitations is interposed as a defense, the question of payment becomes of no importance; the plaintiff cannot recover, although it may be certain he has not been paid."

[6] Gregory v. Commonwealth, 121 Pa. 611, 15 Atl. 452 (1888).

[7] Hummel v. Lilly, 188 Pa. 463, 41 Atl. 613 (1898).

[8] Morrison v. Collins, 127 Pa. 28, 17 Atl. 753 (1889).

permission to make the inference, in the light of all the proved facts that the debt is paid."[9] This permissive inference is by some courts called a presumption of fact, and it should not be confused with the presumption of payment arising out of a lapse of time, which is a mandatory presumption of law.[10]

GUARANTY—BANKRUPTCY OF DEBTOR—DUTY OF GUARANTEE—The defendant conditionally guaranteed purchases that A might make, up to $200. A went into bankruptcy and the plaintiff, the guarantee, did not file proof of claim in bankruptcy court but sued the guarantor instead. *Held:* It was not necessary for the plaintiff to file proof of claim in bankruptcy in order to fulfill his duty to be "duly diligent" in attempting to collect his claim from the principal debtor. *Beitler v. Rudkin*, 133 Atl. 214 (Conn., 1926).

The authorities are divided into two schools of thought as to the meaning of the term "duly diligent" when the debtor is insolvent. The minority view holds that it is necessary for the guarantee to exhaust every legal remedy possible before the conditional guarantor is liable, even though the debtor is insolvent, on the theory that it is a condition precedent to the guarantor's obligation.[1] The majority view is that it is not necessary to bring suit against an insolvent debtor, on the theory that suit would be fruitless and a needless expense to the guarantee.[2] While filing proof of claim in bankruptcy court is not so burdensome as bringing suit, and while it does offer a comparatively easy means for collecting in many instances part of the claim, yet, it is submitted that, in accordance with courts following the majority view, there should be no duty on the guarantee so to do. His duty to the guarantor arises out of the contract of guaranty and unless the contract stipulates that the guarantee must pursue every legal remedy possible,[3] there is no duty on the guarantee to minimize the debt.[4] Nor is there any duty on the guarantee to sue the principal

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[9] Bean v. Tonnele, 94 N. Y. 381 (1884); 1 ELLIOT, EVIDENCE (1904), §§ 83, 119; STEVENS, EVIDENCE (10th ed. 1922) 161: "A presumption of fact is simply an argument."

[10] "The presumption has a technical force or weight, and the jury in absence of sufficient proof to overcome it, should find according to the presumption; but in the case of a mere inference, there is no technical force attached to it. . . . An inference is nothing more than a permissible deduction from evidence, while a presumption is compulsory, and cannot be disregarded by the jury." Walker, *J.*, in Codgell v. R. R. Co., 132 N. C. 852, 44 S. E. 618 (1903). See also Thompson v. Larsen, 247 Pac. 141 (Ore., 1926); THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 339 *et seq.*

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[1] Bosman v. Akeley, 39 Mich. 710 (1878); Central Investment Co. v. Miles, 56 Neb. 272, 76 N. W. 566 (1898); Mosier v. Woful, 56 Barb. 80 (N. Y., 1878).

[2] Allen v. Rundle, 50 Conn. 9 (1882); Nance v. Winship Mach. Co., 94 Ga. 649, 21 S. E. 901 (1894); Sanford v. Allen, 1 Cush. 473 (Mass., 1848); Osborne v. Thompson, 36 Minn. 528, 33 N. W. 1 (1887); Wheeler v. Drake, 129 Mo. App. 547, 107 S. W. 1105 (1908); Stone v. Rockefeller, 29 Ohio, 625 (1876); Woods v. Sherman, 71 Pa. 100 (1872); Nat'l Bank v. Thomas, 220 Pa. 360, 69 Atl. 813 (1908); Bull v. Bliss, 30 Vt. 127 (1857).

[3] Eddy v. Stanton, 21 Wend. 255 (N. Y., 1839); Allen v. Rundle, *supra*, note 2.

[4] Nat'l Loan & Bldg. Society v. Lichtenwalner, 100 Pa. 100 (1883).

debtor when the latter is able to pay only part of the claim.[5] It therefore follows that as the law does not impose any duty in those cases, neither should it impose such a duty in the case of bankruptcy proceedings, and so proof of claim would not need to be filed in bankruptcy court. A recent Wisconsin case, on facts analogous to the instant case, except that the debtor went into receivership instead of bankruptcy, held that it was necessary for the guarantee to pursue his claim in the receivership to be "duly diligent."[6] The cases are, however, distinguishable on their facts alone, without taking into consideration the fact that Wisconsin holds to the minority view. Bankruptcy involves insolvency, whereas a firm perfectly solvent may be in the hands of the receivers due to lack of liquid assets. These two cases taken together show to what extent their respective jurisdictions will go in construing the meaning of "due diligence."

LANDLORD AND TENANT—IMPLIED COVENANT—USE OF PREMISES—Defendant was the lessee for a term of years of plaintiff's premises. The lease contained, *inter alia,* the customary forfeiture clause but was silent as to the use of the premises. Defendant paid his rent according to contract but never occupied the premises and plaintiff now sues to have the lease cancelled on the ground that the premises have fallen out of repair and become uninsurable. *Held:* An implied covenant exists on the part of the lessee to use the premises for some lawful purpose to which they are adapted and upon failure to do so, he forfeits his lease. *Asling v. McAllister-Fitzgerald Lumber Co.,* 244 Pac. 16 (Kan., 1926).

There is some diversity of opinion as to whether there is a duty upon a lessee to use leased premises. It has recently been held that there is no such obligation.[1] Where, under this view, a lease is silent as to the use of the premises, the lessee has the right to use the demised premises for whatever purposes he likes, provided they are not illegal or immoral and do not create a nuisance.[2] It would therefore appear that the lessee has the right to leave the premises unoccupied as long as he pays the rent according to contract.[3] Most courts are very reluctant to enforce forfeitures, especially for waste,[4] or for the breach of an implied covenant, the only available remedy being an action for damages.[5] The dissenting opinion in the principal case held that there was no implied obli-

[5] Gillespie v. Wheeler, 46 Conn. 410 (1878).

[6] McIntyre v. McGovern, 185 Wis. 290, 201 N. W. 259 (1924); 9 MINN. L. REV. 387 (1925).

[1] Benson v. Sauris, 204 S. W. 550 (Mo. App., 1918); Burdick v. Fuller, 199 App. Div. 94, 191 N. Y. Supp. 442 (3d Dept. 1921). *Contra:* Nave v. Berry, 22 Ala. 382 (1853).

[2] Rockwell v. Eiler's Music House, 67 Wash. 478, 122 Pac. 12 (1912); REDMAN, LANDLORD AND TENANT (7th ed. 1920) 362.

[3] *Cf.* United States v. Bostwick, 94 U. S. 53 (1876); 1 TIFFANY, LANDLORD AND TENANT (1910) *727.*

[4] TIFFANY, *ibid.* 736.

[5] Semiday v. Central Aguirre Co., 239 Fed. 610 (C. C. A. 1st, 1917); Stoddard v. Illinois Imp. & Ballast Co., 205 Ill. App. 258 (1917); Homet v. Singer, 35 Pa. Super. 491 (1908).

gation on the part of the lessee to occupy the premises. To imply a covenant and then to use a breach of it as sufficient to work a forfeiture seems rather drastic. It is submitted that the dissenting opinion, representing the weight of authority, is preferable.

NEGLIGENCE—FAILURE TO COMPLY WITH LICENSING STATUTE—The plaintiff sued to recover for damages to his motorbus, caused by the negligence of the defendant's motorman. The bus was operated without a franchise under an invalid permit issued by the Department of Plant and Structures of New York City. *Held:* The operation of the bus without authority was a concurring cause of the collision with the street car, precluding recovery. *Klinkenstein v. Third Avenue Railroad Co.*, 216 App. Div. 187, 214 N. Y. Supp. 725 (1st Dept. 1926).

The principal case seems to run contrary to the usual principles of tort law. The almost universal rule in cases analogous to this is that the mere violation of a statutory duty, such as neglect to procure a license for the driver,[1] or for the car,[2] will not constitute a defense unless it is in fact the efficient cause of the injury. Pennsylvania is in accord with this view,[3] and the opposed Massachusetts ruling may be traced to the peculiar construction of the statute in that state[4] on the registration of vehicles, which makes of the offender a practical outlaw.[5] The court in the principal case bases its holding on the fact that the bus was a public nuisance, and a trespasser on the highway. While, however, a trespasser is offered no primary protection, there is a duty of care owed to a known trespasser not to injure him by any positive act.[6] In any event, the analogy does not hold good here, as the case involves no trespass toward the defendant. The latter, as a third party, cannot claim the immunity afforded to landowners.[7] It is submitted that the decision marks an unwise

[1] Page v. Mayors, 191 Calif. 263, 216 Pac. 31 (1923); Moyer v. Walden W. Shaw Livery Co., 205 Ill. App. 273 (1916); Moore v. Hart, 171 Ky. 725, 188 S. W. 861 (1916).

[2] Whitworth v. Jones, 58 Calif. App. 492, 209 Pac. 60 (1922); Gilman v. Central Vermont R. R., 93 Vt. 340, 107 Atl. 122, 16 A. L. R. 1108, note (1919). *Contra:* Dudley v. Northampton Street Ry., 202 Mass. 443, 89 N. E. 25 (1909). New York in the past has applied the majority test in regard to suits brought by drivers who at the time of the accident were in illegal operation of their car. Clark v. Doolittle, 205 App. Div. 697, 199 N. Y. Supp. 814 (4th Dept. 1923); Hall v. Heep, 210 App. Div. 149, 205 N. Y. Supp. 474 (4th Dept. 1924). It is interesting to note that one judge in the Appellate Term of the New York Supreme Court has recently allowed recovery on facts identical with those in the principal case. Churchill, *J.*, in Audubon Transp. Co. v. Yonkers R. R., 126 Misc. 180, 212 N. Y. Supp. 684 (Sup. Ct. December 1925). The decision in question is at present on the Fall Calendar of the Appellate Division.

[3] McIlhenny v. Baker, 63 Pa. Super. 385 (1916); Williams v. D'Amico, 78 Pa. Super. 577 (1922).

[4] Mass. Rev. Laws (1910) c. 54 § 3.

[5] Dudley v. Northampton Street Ry., *supra*, note 2.

[6] Herrick v. Wixom, 121 Mich. 384, 80 N. W. 117 (1899); Walsh v. Pittsburgh Rys., 221 Pa. 463, 70 Atl. 826 (1908). *Contra:* Hoberg v. Collins & Co., 80 N. J. L. 425, 78 Atl. 166 (1910).

[7] Guinn v. Delaware Tel. Co., 72 N. J. L. 276, 62 Atl. 412 (1905); Daltry v. Media Elec. Co., 208 Pa. 403, 57 Atl. 833 (1904).

departure. It would seem a reckless step to exclude one who has simply neglected to secure a franchise from the protection of the law, and at the same time to relieve the defendant of his duty of care toward one of whose presence he is aware and of whose fault he can have no suspicion. To hold in effect that the plaintiff was contributorily negligent is utterly to confound the distinction between a condition and a cause.

TRUST DEED—PROBATE AS WILL—ANIMUS TESTANDI—The deceased, a practicing attorney, executed simultaneously a will and a trust instrument, the latter drawn in the form of a deed, operating *in præsenti* and witnessed by two persons two days after its execution. The trust deed, after reserving the power of revocation to the settlor, provided that the interest of the trust fund be paid the settlor during his life and the principal be paid to designated persons, upon his decease. The settlor exercised the power of revocation by adding five beneficiaries and cancelling one gift made in the original trust deed. The residuary clause of the will provided that the residue of the testator's estate be added to the principal of the trust fund and be distributed to the same persons and in the same proportions as the principal of the trust fund. In an independent action in the Federal Court [1] probate of the residuary clause had been refused, it being argued by that Court that this clause caused the real disposition of the property to be made by the trust deed, an instrument not executed according to the *Statute of Wills*. The residuary legatees then brought the principal case in which probate of the trust instrument as a part of the will was sought. *Held:* The residuary clause be given effect by the probate of the trust deed as a part of the will. *Merrill v. Boal*, 132 Atl. 721 (R. I., 1926).

The contradictory holdings of the courts in the principal case and in the other cases involving these same instruments, can not be supported or explained on any logical grounds. It had been previously decided in *Atwood v. Rhode Island Hospital Trust Co.*[2] that gifts having been made to persons through the exercise of the power of revocation in the trust deed, without the formalities required by the Statute of Wills, the trust instrument was not validly executed as a will. But the court in the principal case probates as a will this same trust instrument. If it was justified in so doing, *a fortiori*, the Federal Court erred in refusing probate to the residuary clause.

Even if the court in the principal case is correct in its conclusion that the trust deed satisfied the statutory formalities of a will, it can not operate as a will unless executed with *animus testandi*.[3] The same court that decided the principal case held in the connected case of *Davis v. Manson* [4] that the trust deed was not so executed. To determine whether the court was justified in reversing itself, it is necessary to examine the form and terms of the instrument,[5] the

[1] Atwood v. Rhode Island Hospital Trust Co., 275 Fed. 513 (C. C. A. 1st, 1921).

[2] *Ibid.*

[3] *In re* Meade's Estate, 118 Calif. 428, 50 Pac. 541 (1897); Fleming v. Morrison, 187 Mass. 120, 72 N. E. 499 (1904).

[4] 102 Atl. 714 (R. I., 1918).

[5] Seay v. Huggins, 194 Ala. 496, 70 So. 113 (1915); Fellbush v. Fellbush, 216 Pa. 141, 65 Atl. 28 (1906).

situation of the parties,[6] as well as to ascertain whether the instrument was capable of operating in any other way than as a will, since some courts presume the existence of *animus testandi* under those conditions.[7] Applying these rules of construction to the facts of the case, the necessary conclusion is that the trust deed was not executed *animus testandi*. Neither the form nor the terms of the trust instrument, nor the surrounding circumstances, warrants such a conclusion. Moreover, the trust deed being a perfectly valid instrument, its probate as a will can not be supported on the basis of its incapability to operate in any manner, if not as a will. Furthermore, the holding results in a legally untenable situation in that it causes the trust deed to have present operation over *res* in the hands of the trustees and testamentary effect over property never delivered to the trustees,[8] nor mentioned in the trust agreement.[9] The Court's holding is undoubtedly due to a desire to give effect to the intention of the testator, ineffectually expressed in the residuary clause. It is submitted that, by making this intent controlling, a result has been reached which is contrary to the law and to the intent of the testator in executing the trust deed.

WASTING ASSETS CORPORATIONS—PREFERRED STOCKHOLDERS' RIGHTS—CAPITAL ASSETS—PROFITS AND SURPLUS—The defendant, a Delaware corporation, was engaged in the mining and smelting of mineral ores. The complainants, as preferred stockholders, filed a bill for an injunction to restrain the payment of a dividend on the common stock, contending that, as a wasting asset corporation, the capital assets of the defendant were depleted and no provision had been made for capital replenishment, in order that the preferred stock might be paid off in the event of liquidation. The Delaware corporation law[1] provides that dividends must be declared from surplus or net profits. *Held:* There were no net profits or surplus within the meaning of the act.[2] *Wittenberg v. Federal Mining and Smelting Co.*, 133 Atl. 48 (Del., 1926).

It is well settled that the ordinary business corporation cannot lawfully declare dividends out of its capital, and thereby reduce the same, or out of assets which are needed to pay the corporate debts.[3] In many jurisdictions this rule is covered by statute.[4] There is great lack of unanimity among the cases

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[6] Sharp v. Hall, 86 Ala. 110, 5 So. 497 (1888); Milan v. Stanley, 33 Ky. 783, 111 S. W. 296 (1908).

[7] Barnewall v. Murrell, 108 Ala. 366, 18 So. 831 (1895); *In re* Kennedy, 159 Mich. 548, 124 N. W. 516 (1910).

[8] Brown v. Spohr, 180 N. Y. 201, 73 N. E. 14 (1904); Talbot v. Talbot, 32 R. I. 72, 78 Atl. 535 (1911).

[9] Kennebrew v. Kennebrew, 35 Ala. 628 (1860); Robinson v. Schly, 6 Ga. 515 (1849); Powers v. Scharling, 64 Kan. 339, 67 Pac. 820 (1902).

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[1] Del. Rev. Code (1915), §§ 1948, 1949; 29 Del. Laws (1917), c. 113, § 7.

[2] *Ibid.*

[3] Mobile Co. v. Tennessee, 153 U. S. 486, 496 (1893); Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 77 N. E. 13 (1906); Loan Society v. Eavenson, 248 Pa. 407, 94 Atl. 121 (1915). See REITER, PROFITS, DIVIDENDS AND THE LAW (1926) 32, 111.

[4] Del. Rev. Code (1915), § 1949; N. J. Comp. Stat. (1910), 1617; Act of 1913, P. L. 336, Pa. Stat. (1920), § 5786.

in the interpretation of the words "surplus," "net profits," and "net income." [6] But with regard to "wasting asset" corporations, in the leading case of *Lee v. Neuchatel*,[6] which has been frequently cited with approval in England [7] and this country, it was said that "although the property (an asphalt concession) was a wasting property, there was no obligation to make any provision for depreciation." [8] However, no depreciation or loss of capital assets was proved, nor were there relative rights of two classes of stockholders involved, as in the instant case. In one of the earliest American cases dealing with this question,[9] it was laid down that a wasting asset corporation "is not deemed to have divided its capital merely because it has distributed the net proceeds of its mining operations, although the necessary result is that so much has been extracted from the substance of the estate." [10] It was well pointed out by the Chancellor in the principal case, that in none of the cases cited by the defendant [11] were the facts identical with those of the case under discussion. Although their doctrine on its face seems opposed, yet in none of them was a depletion of capital assets actually shown, nor was the question one of relative rights of preferred and common stockholders.[12] And in the taxation cases,[13] in which, too, stockholders' relative rights were in no wise involved, it has been held that for purposes of taxation, "depreciation" does not include the depletion of capital assets due to extracting ores.[14] However, in the *Income Tax Law of 1916*,[15] and in the *Excise Tax Law*,[16] "reasonable allowance" is made in the case of mines for depletion thereof.[17] In its interpretation of "net profits or surplus" in the principal case, it is submitted that the Court decided upon the plainest principles of just and fair dealing among the stockholders. Nor can it be said, in spite of the dicta of the leading case [18] and the deserved repute of the text-writers

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[6] Goodnow v. American Writing Paper Co., 73 N. J. Eq. 692, 69 Atl. 1014 (1908); Hyams v. Old Dominion etc. Co., 82 N. J. Eq. 507, 91 Atl. 1069 (1913); Hutchison v. Curtis, 45 Misc. 484, 92 N. Y. Supp. 70 (1904).

[6] 41 Ch. Div. 1 (Eng., 1889). See REITER, *op. cit., supra*, note 3, at 38.

[7] Verner v. General Commercial Trust, [1894] 2 Ch. 239; Ammonia Soda Co. v. Chamberlain, [1918] 1 Ch. 266; Lawrence v. Ry., [1918] 2 Ch. 250.

[7] But see Dovey v. Cory, [1901] A. C. 477; Bond v. Haematite Co., [1902] 1 Ch. 353; PALMER ENGLISH COMPANY LAW (12th ed., 1924) 227.

[8] Excelsior Co. v. Pierce, 90 Cal. 131, 27 Pac. 44 (1891).

[9] *Cf.* Mellon v. Glass Co., 77 N. J. Eq. 498, 78 Atl. 710 (1910). See Boothe v. Summit Co., 55 Wash. 167, 173, 104 Pac. 207, 209 (1909); 2 COOK, CORPORATIONS (8th ed., 1923), § 546.

[10] All cases cited in all notes *supra* and *infra*.

[11] See Van Vleet v. Evangeline Oil Co., 129 La. 406, 56 So. 343 (1911).

[12] Stratton's Independence v. Howbert, 231 U. S. 399 (1913); Stanton v. Baltic Co., 240 U. S. 103 (1916); Von Baumbach v. Sargent Land Co., 242 U. S. 503 (1917).

[13] Von Baumbach etc., *supra*, note 13.

[14] 39 Stat. 756, 769 (1916), U. S. Comp. Stat. (1918), § 6336l[a].

[15] 36 Stat. 112 (1909), U. S. Comp. Stat. (1913), § 6301.

[16] In United States v. Nipissing Mines Co., 202 Fed. 803 (S. D. N. Y., 1912), "depreciation" of property was held to include all ore extracted for the current year. *Cf.* Stanton v. Baltic Min. Co., *supra*, note 13.

[17] Lee v. Neuchatel, *supra*, note 6.

who sustain it,[29] that any of the courts involved in the many cases cited would not have held differently upon the facts of the instant case. And it is further submitted that in all but exceptional cases the proper test of the ability to pay dividends is "whether, after payment and satisfaction of all liabilities, taking into account the ability to redeem the capital stock at par, there still remains a fund out of which the proposed dividend can be paid without impairment of the capital."[30]

WILLS—CONSTRUCTION—DISTRIBUTION PER STIRPES OR PER CAPITA—The testator in the second paragraph of his will bequeathed the sum of one dollar to "the heirs of my beloved daughter deceased." And in the five ensuing paragraphs he made bequests of one dollar to each of his five children by name. He then provided that the residue of his estate be equally divided between his "above-named children, their heirs or assigns, share and share alike." Each one of the three children of the deceased daughter claimed the right to take *per capita* along with the five living children of the testator, that is one-eighth of the residue. *Held:* The three grandchildren take *per stirpes* and not *per capita. Canfield v. Jameson,* 208 N. W. 369 (Iowa, 1926).

The general rule is that when a devise is made to "heirs," the law presumes the testator's intention to be that the beneficiaries so designated shall take *per stirpes.*[1] On the other hand, "equally to be divided" and "share and share alike," when used in a will, have been held to indicate a division *per capita* and not *per stirpes,* whether the beneficiaries designated are children and grandchildren, or children and strangers,[2] though the latter proposition admittedly yields to an even faint glimpse of a different intention on the part of the testator in the context.[3] The different intention may be determined by ascertaining whether the will divides the beneficiaries into classes, in which the members of each take equally with the members of the same class, or establishes but one class in which each beneficiary takes equally with every other.[4] It is submitted that the following facts point to the division of the children into six classes, the heirs of each child being members of that particular class and sharing equally with the other heirs of the same child: first, the testator in a distinct paragraph made the same legacy to the grandchildren of the deceased daughter that he made to each one of the five children in the five ensuing paragraphs (though it might be said that the purely nominal character of the legacies somewhat weak-

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[29] 6 FLETCHER, CYC. OF CORP. (1920), § 3670; 2 MACHEN, MODERN LAW OF CORP. (1908), § 1326; 2 COOK, CORPORATIONS (8th Ed., 1923), *loc. cit., supra,* note 10. But see PALMER, *loc. cit., supra,* note 8; REITER, *op. cit., supra,* note 3 at 126.

[30] Hyams v. Old Dominion Co., and Goodnow v. American Co., *supra,* note 5.

[1] Welsh v. Wheelock, 242 Ill. 380, 90 N. E. 295 (1909); McClench v. Waldron, 204 Mass. 554, 91 N. E. 126 (1910); Woodward v. James, 115 N. Y. 346, 22 N. E. 150 (1889).

[2] Smith v. Palmer, 7 Hare, 225 (Ch. 1849); McIntire v. McIntire, 192 U. S. 116 (1904); Priester's Estate, 23 Pa. Super. 386 (1903).

[3] Kling v. Schnellbecker, 107 Iowa, 636, 78 N. W. 673 (1899).

[4] Doherty and Hayes v. Grady, 105 Me. 36, 72 Atl. 869 (1908).

ens this contention); second, the use of the word "their" in the residuary clause shows that in referring to "heirs" the testator did not have these particular children in mind; and, finally, the addition of "assigns" as alternate with "heirs" in "heirs or assigns" could hardly be construed so as to lead to the conclusion that, if one of the testator's children had "assigned his interest to two or more persons the mere number of assigns could have affected the proportion the other legatees would take."[5] The decision finds further support in Pennsylvania in the doctrine that unless the testator has clearly provided a different mode of distribution in his will, the law will presume the testator's intention to have been to dispose of his property in accordance with the policy laid down by the intestate law.[6]

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[5] In main case on page 370, supported by Congreve v. Palmer, 16 Beav. 435 (Ch. 1853).

[6] Ashburner's Estate, 159 Pa. 545, 28 Atl. 361 (1894). For provisions of intestacy see *Intestate Act of 1917*, P. L. 429, § 7 [d] 3, Pa. Stat. (1920) § 8362.