# RECENT CASES

ADVERSE POSSESSION—PUBLIC HIGHWAYS—TRIAL.—The plaintiff was injured while crossing the railroad tracks of the defendant upon the unused portion of a turnpike crossing. Defendant contends that it has acquired title to the unused portion of the turnpike crossing, through adverse possession for the statutory period,[1] and, therefore, that plaintiff was a trespasser and not entitled to recover. Upon these facts the Supreme Court directed a verdict for the defendants; this verdict was reversed by the Court of Errors and Appeals on the ground that it was at least a question for the jury to decide whether the land was cultivated or uncultivated;[2] thus deciding whether the defendant came within the purview of the statute. *Miller v. Pennsylvania and Reading Seashore Lines, Inc.*, 117 N.J.L. 152, 187 Atl. 332 (E.&A. 1936).

The court in this case has reversed the lower court on the ground that it was a question of fact for the jury to decide whether or not the land was cultivated or uncultivated, to determine whether the defendant had maintained adverse possession for a long enough period to have acquired title under the provisions of the statute. This position of the court assumes that the defendant could acquire title through adverse possession as against the public, for it is well settled that turnpikes constitute public highways.[3] And it is equally true that the right of the public to use a highway extends to the whole breadth thereof, and not merely to the part that is worked or used.[4]

It is well settled in New Jersey that an encroachment upon a street or public highway cannot be legalized by the mere lapse of time.[5] Time does not run against the state, or the public, by analogy to the statute

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[1] N. J. P. L. 1922, ch. 188, Comp. Stat. Supp. 1924, § 119-28, "Thirty years actual possession of any lands, tenements, or other real estate, excepting woodlands or uncultivated lands and that sixty years actual possession of any woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, etc., in whatever way or manner such possession might have commenced, shall vest full and complete right and title in every actual possessor or occupier."

[2] Observe difference in statutory period required to vest title to woodlands or uncultivated tracts and that required to vest title to cultivated lands. See note 1.

[3] State, Parker v. City of New Brunswick, 32 N.J.L. 548 (E.&A. 1867). Railway Co. v. State Board of Assessors, 80 N.J.L. 83, 77 Atl. 609 (Sup. Ct. 1910).

[4] Opdycke v. Public Service, 78 N.J.L. 576, 76 Atl. 1032 (E.&A. 1910).

[5] Cross v. Mayor, etc., 18 N.J.Eq. 305 (Ch. 1867).

of limitations against individuals, unless the state or the public are expressly included.[6]

It is, therefore, apparent that the great weight of authority treats the question of adverse possession against the public highways as a question of law. Upon the question the courts of this state have gone so far as to hold that possession of a part of a public highway by an individual, no matter how long continued, does not destroy the public easement therein. The right of the public to appropriate the unused portion of a highway to public use whenever their wants or convenience may require it, may be exercised when the public authorities may deem it advisable to do so; and the lapse of time will not impair that right.[7] The courts of Pennsylvania and Maryland have held that a non-user of the sides of a turnpike, and private occupancy, cannot divest the company's right, after any lapse of time, to occupy the portion not used, since the turnpike is a public road, and no title can be acquired against the public by a user, nor lost to the public by a non-user.[8] This rule that the common right of way cannot be lost by the attempted adverse possession of a private individual has been held to be the established rule of the Common Law.[9]

It is elementary that the common law applies in New Jersey, unless expressly abrogated by statute. The statute under which the defendants in the principal case claim to have acquired title through adverse possession gives not the slightest indication of any intention on the part of the Legislature to include the public or the state among those subject to loss of title by adverse possession.[10] In the absence of any expression of the legislature's intention to so include the public or the state, the common law should apply. It is, therefore, submitted that the decision in the principal case was erroneous; that it was a question of law for the court to determine, and not a question of fact for the jury, although the result of the appeal would have been the same.

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[6] Tainter v. Mayor, etc., 19 N.J.Eq. 59 (Ch. 1868).

[7] Camden County v. Sharpless, 83 N.J.L. 443, 85 Atl. 222 (E.&A. 1912).

[8] Ullman v. Charles St. Ry. Co., 83 Md. 130, 34 Atl. 366 (1896); Stevenson's Appeal, 2 Pa. 367, 6 Atl. 266 (1886).

[9] Ullman v. Charles St. Ry. Co., 83 Md. 130, 34 Atl. 366 (1896).

[10] *Supra*, note 1.

CONTRACTS — CONSTRUCTION — NEGATIVE COVENANTS.—The defendant routemen of the complainant laundry company declared a strike for higher pay after their employer had proposed a reduction in wages. To further their strike, they distributed among the customers whom they had served while working for the laundry, printed notices which read:

> "Perfect Laundry routemen on strike for a living wage. Kindly co-operate by not sending your bundle to the Perfect Laundry.
>
> "Thank you,
> "Your Routeman."

The strikers also told their former customers of their grievances and sought orally to persuade them to withhold their trade during the strike. The complainant sought to enjoin this conduct of its routemen on two grounds: (1) that the defendants were conducting an illegal boycott, and (2) that they were violating a negative covenant each had made with the complainant at the time of hiring. The court *held*: that the complainant was not entitled to an injunction on either ground. *Perfect Laundry v. Marsh,* 120 N.J.Eq. 508, 186 Atl. 470 (Ch. 1936).

The court first dealt with the question of boycott, and held the defendants acts lawful though tending to damage the complainant, because their object was lawful.[1] With this portion of the opinion, no quarrel is raised, but the reasoning employed in disposing of the remaining ground is illogical.

The covenant which the defendants were alleged to have violated read:

> "The employee further agrees that he will not, within the period of one year after the termination of his employment, in any way directly, or indirectly, solicit, divert, take away, or attempt to solicit, divert or take away any of the customers, business or

[1] In refusing the injunction on this ground the court said, "The object the strikers have in view, higher wages, is lawful, of course, and one which will justify their actions, if any object can do so. . . They may appeal to friends, to customers, and to the public generally, to assist them by refusing to deal with their employer. If the effect is to ruin the employer, it is *damnum absque injuria.*"

patronage of such customers, as were served by the company during his period of employment."[2]

Relying on *Kislak v. Muller*,[3] and *Sarco v. Gulliver*,[4] the court said that the contract should be construed most strongly against the complainant and that ambiguities must be resolved in favor of the employee. Whereupon it held that the strikers were *not* soliciting, diverting or taking away the complainant's business within the meaning of the covenant and refused the injunction.

It is submitted that the court in reaching its decision relied more on its conception of social justice than on a strict interpretation of contract rights. Granting that there was no secondary boycott, that no injunction could have issued against the strikers in the absence of the covenant, and that no injunction would have issued had the defendants sought to enlist only the aid of outsiders other than customers, the court unquestionably drew a very fine line in its construction of the covenant.

It is well settled that the rule whereby a written contract is taken most strongly against the writer is the last rule of construction to be resorted to and never to be relied upon except where other rules of construction fail.[5] The rule to be applied is that the words employed will be given their ordinary and popularly accepted meaning in the absence of anything to show they were used in a different sense.[6] In allowing an injunction against an employee who violated a similar contract,[7] the Supreme Court of Wisconsin found no ambiguities in the words, " . . . he will not directly or indirectly, solicit, divert or take away or attempt to solicit, divert or take away any of the customers, business or patronage of such customers . . ." etc. Nor do we.

All rules of construction are subordinate to the leading principle that the intention of the parties, to be collected from the entire instru-

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[2] Note that defendants' positions were filled at once by the employer.

[3] 100 N.J.Eq. 110, 135 Atl. 673 (Ch. 1927).

[4] 3 N.J.Misc. 641, 129 Atl. 399 (Ch. 1925), *aff'd*, 99 N.J.Eq. 432, 131 Atl. 923 (E.&A. 1926).

[5] Empire Rubber Mfg. Co. v. Morris, 73 N.J.L. 602, 65 Atl. 450 (E.&A. 1906).

[6] Proprietors' Realty Co. v. Wohtlmann, 95 N.J.L. 303, 112 Atl. 410 (Sup. Ct. 1921).

[7] Eureka v. Long, 146 Wis. 205, 131 N.W. 412 (1911).

ment must prevail, unless inconsistent with some rule of law.[8] The obvious purpose of this covenant was not to prevent the employee from entering a competing business (for the restriction was for one year only), but from damaging in any way the goodwill value of complainant's list of customers which the employer had by his efforts and expenditure of capital, succeeded in building up.[9] The basic and, in fact, the only reason for including a restrictive covenant of this nature in the employment contract is to prevent the employee from using the confidential knowledge of the list of customers to the detriment of the employer, either before or after leaving his employ.[10]

What, then, do the words used ordinarily mean? "Solicit" is usually accepted as "endeavoring to obtain, usually for one's self or benefit, by asking or pleading,"[11] "divert," "to turn aside (from or to); to turn off from any intended course; to deflect; as to *divert* commerce from its usual course,[12] and take away," is "to remove, to cause deprivation of."[13] The purpose of the defendants' appeal was not to appropriate unto themselves the patronage of the customers, but to withhold it from the complainant. Is it reasonable to assume that, if the customer acquiesed, he would keep his wash collected, or go about in dirty clothes, awaiting the determination of the strikers' cause? Obviously not. The wash would be sent to some competitor, or else done at home. In either case, the patronage has been diverted, or turned away, from the employer, but wherever to, it is immaterial. The complainants' business has been diverted. And the patronage, in either case, has been "taken away"—the laundry has been deprived of it. The loss to it is the same whether the strikers solicited the busi-

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[8] Horner v. Leeds, 25 N.J.L. 106 (Sup. Ct. 1855).

[9] Golden Cruller & Doughnut Co. v. Manasher, 93 N.J.Eq. 537, 123 Atl. 150 (Ch. 1923). Here the court in granting an injunction against a former employee who was using a list of customers served by complainant, asked the question, "For what purpose, as a reasonable man, did the defendant, Manasher, think he was required to keep secret and employ only for the complainant's benefit the list of customers that was entrusted to him?"

[10] See 44 L.R.A. (NS) 1159 for a comprehensive note on the confidential nature of customer lists.

[11] Webster's New International Dictionary.

[12] *Id.*

[13] *Id.*

is approved and accepted at the home office of the company, and in case of rejection, the premium shall be returned." Two days after the application, and before any act of rejection or acceptance on the part of the company, applicant died. *Held*—there was a contract. *Reck v. Prudential Life Insurance Co.*, 116 N. J. L. 444, Atl. 777 (E.&A. 1936).

"Failure of the agent to notify company, if failure there was, does not relieve the company of liability, the agent being the representative of the company and not of the applicant."[1] The court says that the company knew of the offer because it should have known of it. But may one assume, with the court, that the company accepted the offer because we presume that it *knew* of it?

A mere unaccepted proposal does not constitute a contract.[2] Acceptance is essential to the creation of a contract, regardless which side makes the offer.[3] The insurance company expressly reserved to itself distinct from its agent, the power to *accept* and *approve* the offer at the home office in Newark. No agent, no branch office, could exercise this authority. Where acceptance and approval at the home office is one of the terms imposed in the application, it is essential.[4]

Assuming that the company did know, because it should have known of the offer, can we spell out from the conduct of the home office any exercise of the power which it alone possessed, of accepting that offer and completing the contract?

The ordinary method of accepting an application for life insurance is by delivery of a policy. It has even been held that delivery of a policy of life insurance is essential to a completed contract of insurance unless such delivery is waived by the insurer.[5] Without going quite as far as the adjudication in that case would carry us, we may safely say that there was no acceptance according to the prevailing usage in the insurance business.

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[1] Reck v. Prudential Life Ins. Co., 116 N.J.L. 444, 184 Atl. 777 (1936).

[2] McGowin Lumber & Export Co. v. R. J. and B. F. Camp Lumber Co., 192 Ala. 35, 68 So. 263 (1915); Hankins v. Young, 156 N.W. 380, 174 Ia. 383 (1916).

[3] Baldwin v. Pa. Fire Ins. Co., 20 Pa. Super. 238 (1902).

[4] Allen v. Mass. Mutual Accident Ass'n., 167 Mass. 18, 44 N.E. 1053 (1896).

[5] Rhodus v. Kansas City Life Ins. Co., 156 Mo. Ap. 281, 137 S.W. 907 (1911).

May we infer acceptance in any other way than by delivery of a policy? Silence has been deemed to be consent to an offer,[6] but are we thereby permitted to construe all silences as acceptances? An offer cannot be turned into an agreement because the person to whom it is sent makes no reply,[7] nor will silence amount to the acceptance of an offer unless it is expressly so agreed.[8] When silence has been construed as acceptance, it has been so held because an affirmative act of rejection was necessary,[9] as was held in *Royal Insurance Co. v. Beatty*,[10] where the court said, "If the declaration imposed a duty of speech on peril from an inference from silence, the fact of silence *might* justify the inference of an admission of the truth of the declared fact." If a declaration does not inevitably impose a duty of speech, how then does a mere question or application?

In the case at bar the court seems of the opinion that the retention of the premium was an act of acceptance, and a return of the premium was a necessary act of rejection, which, not being performed, made a contract. Whether in fairness it may be so construed, would seem to depend on the length of time permitted to the company in which to receive notification from its agent, pass upon the merits of the application, and in case of rejection, to return the premium money. It should be noted that in the receipt, no time was set within which the money was to be returned. What then will constitute a reasonable length of time under the circumstances of modern business usage? This question the court did not consider, but justice seems to demand that it should.

Mere delay in accepting or rejecting an offer cannot make an agreement.[11] A lapse of eighteen days has been held not so extraordinary as to authorize an implication that the application was accepted.[12] The overwhelming weight of authority is to the effect that mere delay in passing upon an application is not equivalent to its acceptance.[13] Is it

[6] Royal Ins. Co. v. Beatty, 119 Pa. 6, 12 Atl. 607 (1888).

[7] Beach v. U. S., 226 U. S. 243 (1912).

[8] Cincinnati Equipment Co. v. Big Muddy River Consolidated Coal Co., 158 Ky. 247, 164 S.W. 794 (1914).

[9] Beach v. U. S., 226 U. S. 243 (1912).

[10] 119 Pa. 6, 12 Atl. 607 (1888).

[11] Equitable Life Ins. Society v. McElroy, 83 Fed. 631 (C.C.A. 1897).

[12] Winneshick Ins. Co. v. Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64 (1870).

[13] Dorman v. Conn. Fire Ins. Co., 41 Okla. 509, 514, 139 Pac. 262 (1914).

reasonable, then, to construe two days as an unwarrantable delay in the functioning of the machinery of acceptance in the huge and complex organization of a modern national insurance company? If we conclude that there was not necessarily adequate time in which the company might pass upon the application, it would seem to follow that there was neither an actual nor constructive acceptance on the part of the home office during the period between the making of the offer and the death of the offeree.

No acceptance having occurred during that period, the company was then powerless to accept at all, for to establish a contract, "it must appear that the minds of the parties met." Obviously, therefore, a contract cannot be made with a dead man; and death before acceptance causes an offer to terminate.[15] It is an equally well established fundamental of insurance law that, when the subject matter of the proposed insurance has ceased to exist, the approval or rejection is ineffectual for any purpose.[16]

*Mutual Life Insurance v. Jordan*[17] is a case directly in point, where the insured died before delivery of the policy, and the beneficiary was not allowed to recover.

There having been no actual acceptance in the instant case, nor any delivery of the policy, it seems that the question of constructive acceptance might have been more fully considered by the court, in view of the brief period allowed the company in which to pass on the application before the death of the applicant revoked the offer, rather than to imply, as was done, that there was an acceptance and contract merely because no act of rejection had been performed.

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EMBLEMENTS—REQUISITES—EXECUTION.—X and his wife were tenants by the entirety of a farm. They executed a note on the farm to a finance company. Subsequently they rented the mortgaged farm to

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[15] Houston v. Monumental Radio, 148 Atl. 536 (Md. 1930).
[16] Marr v. Shaw, 51 Fed. 860 (C.C. 1892).
[17] Mutual Life Ins. Co. v. Jordan, 111 Ark. 324, 163 S.W. 799 (1914).
[17] 111 Ark. 324, 163 S.W. 799 (1914).

the plaintiff by means of a peculiarly worded instrument.[1] Plaintiff then entered into possession of the farm. Thereafter, the finance company recovered judgment against X on their note which was duly docketed and execution issued thereon. The sheriff levied on the lands in question. After the recovery of judgment against X, the plaintiff sowed twenty-eight acres of rye. On November 8, 1934, after due advertisement, the sheriff sold the premises under execution to the Y Realty Company which in turn sold it to the defendant who entered into possession and began ploughing the crop under. At this time the plaintiff notified the defendant of his claim and brought this suit to enforce his right to the crop. *Held*—(1)—A tenant, unless he terminates his estate through his own fault or misconduct, has a right to emblements, or way going crops, whether his term be certain or uncertain, to the end that he may have and enjoy the full benefit of his term and no more. (2) That title acquired from a *bona fide* purchaser for value, without notice of plaintiff's lease, was taken free and clear from any outstanding claims, even if the purchaser had actual or implied notice of such claim. *Eckman v. Beihl,* 116 N.J.L. 308, 184 Atl. 430 (Sup. Ct. 1936).

The common law rule is that "where the renting is for a time certain, the tenant is not entitled to such crop, because if it is certain at the time when he sows, how long the tenancy will continue, and it is plain that before he ceases he cannot reap that which he may sow,

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[1] "Browns Mills, N. J.
Mar. 25, 1934

"This 25 day of March 1934

"We Margaret and Elmer Smires has agreed to rent to Lyman Eckman their farm containing 46 acres on road leading from Browns Mills to Lewistown one and ½ miles from the former place, for the consideration of one dollar $1.00 and other valuable considerations for general farm crop purposes. And it is further understood the ground which is farmed during the farming season shall be sown down in the fall with rye or other cover crop, and further understood that at least 10 acres of this cover crop shall be rye and shall remain in the ground and be harvested the following Summer or all of the cover crop may be rye and used for harvesting if Mr. Eckman so desires.

(signed) Margaret Smires
Elmer Smires
Lyman Eckman"

it is his folly if he sows."[2] Very early in the judicial history of our state the courts recognized the strictness of this rule and by their decisions modified the rule on the basis of custom and reasonableness. In *Van Doren v. Everett*[3] the court, after reviewing the common law rule and its exceptions even in England, came to the conclusion that where a tenant has a lease for a year and he sows grain in the autumn, he is entitled to enter and gather such crops after the expiration of his lease.[4] In *Howell v. Schenck*,[5] the same court some years later reiterated the rule in dealing with the case of a tenant for one year, the court holding, "Its object is to give the tenant the full benefit of the crops of the year of which he would otherwise be deprived as they do not ripen until after the expiration of his term."[6]

However, in the case of *De Bow v. Calfax*,[7] the court placed a slight restriction on its own modification by holding that where the tenancy is ended by the tenant's own act, "the growing crop passes to him who thereupon becomes the immediate owner of the land."[8]

In the case at issue the court then had ample basis for holding that a tenant, even though for a stated term, has a right to emblements or way going crops. It appears also that even if there were not this law to lead to such a conclusion, the court may have been justified in reaching such a result from the implications of the lease which required the sowing of such a crop which could not have matured before the end of the term ot the lease.

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[2] 8 R. C. L. 363, par. 8.

[3] 5 N. J. L. 539, 542, 543 (Sup. Ct. 1819).

[4] The court in arriving at its decision discussed the reasonableness of the rule and the essence of the contract of lease:

"It may be said that he ought to guard himself by covenants. It is true he may do so. But still, the very essence of the contract is that he shall have one year's course of crops. He pays a year's value, he betsows a year's labor, he must sow it in season or not at all, he must eat in the winter as well as in the summer. The very nature of the thing shows that he is to have the successive crops of the year. Shall the tenant be deprived, then, of the substantial benefits of his lease, unless he shall fortify himself with covenants of entry?"

[5] 24 N. J. L. 89 (Sup. Ct. 1853).

[6] In accord, Corle v. Menkhouse, 47 N. J. Eq. 73, 20 Atl. 367 (Ch. 1890); Cook v. Cook, 83 N. J. Eq. 549, 90 Atl. 1045 (Ch. 1914); Reeves v. Hannan, 65 N. J. L. 249, 48 Atl. 1018 (E. & A. 1901).

[7] 10 N. J. L. 128 (Sup. Ct. 1828).

[8] In accord, O'Leary v. Harris, 89 N. J. L. 671, 99 Atl. 774 (E. & A. 1916).

week or more shall be subject to garnishment for an amount not to exceed 10% of the debtor's income unless said income shall exceed $1000 per year, in which case payment of a larger sum may be directed.

The defendant contended that pensions are not subject to garnishment under this act because they are not "wages, debts, earnings, salary, income from trust funds or profits due or to become due." *Held,* that "debt" as used by the legislature in this act means debt in the larger sense, because the evident purpose of the act was to include all obligations payable in periodic installments or in stated sums at not less than $18 per week. The pension being within this classification, was therefore held to be included in the term "debt" and subject to garnishment. *Passaic Nat'l Bank, etc., Co. v. Eelman,* 116 N.J.L. 279, 183 Atl. 677 (Sup. Ct. 1936).

In another recent case involving a pension, the court reaffirmed the rule laid down in *Bennett v. Lee*[2] saying "The accepted rule as to public pensions is that compulsory deductions from the salaries of governmental employees, for the support of a pension fund, create no contractual or vested right between such employees and the government, and the employees have no rights except such as are conferred by the statute creating and governing the fund." *Bader v. Crone,* 116 N.J.L. 331, 184 Atl. 346 (Sup. Ct. 1936).

Pensions can be classified into two general types, public pensions and private pensions. Public pensions are those created by statute and paid to governmental employees. Private pensions are those created either out of generosity of the private employer or by agreement between the private employer and his employees.

There are two rules governing private pensions, and these rules arise from the two ways in which private pensions may be created. Where the employer pays the whole amount of the pension or fund, he can, in the plan for the pension make the relationship one of gift and not one of contract. The employee then has no vested right in the fund even after maturity. His right in the fund or pension arises only when the money is actually paid to him.[8] Such pensions are therefore not subject to garnishment or execution.

Where the employer pays only part of the pension, or specifies terms to which the employees must agree in order to be eligible to

[2] 104 N. J. L. 453, 142 Atl. 362 (Sup. Ct. 1928).

receive the pension, acceptance by the employee of these terms makes a binding contract between employer and employee and the rights of the latter are contract rights determined by the provisions of the plan or agreement.[4] Pensions of this type are subject to garnishment or execution.

Public pensions, on the other hand, are not created by agreement between employer and employee, but by statute. Therefore in determining the law applicable to any public pension, we must first look to the statute creating and governing it to see what rights, if any, the statute gives to the pensioner, and to determine whether the pension is subject to garnishment.

The general test of the liability of a chose in action to garnishment is whether it is assignable,[5] and it is a settled rule that in the absence of a prohibitory statute, a pension granted for past services is assignable if the pensioner is not subject to call for further public services.[6] The court in *Passaic Nat'l Bank v. Eelman,*[7] recognized these principles and went on to say that the logical conclusion to draw therefrom is that all public pensions are subject to garnishment, unless expressly exempted by statute.

On March 3, 1873, Congress passed an act with reference to federal pensions providing that no sum of money shall be liable to attachment, levy, or seizure by or under any legal or equitable process whatsoever, whether the same remains with the pension office or any officer thereof, or is in the course of transmission to the pensioner entitled thereto, but shall enure wholly to the benefit of such pensioner.[8] There is, however, no such act exempting state or municipal pensions. We must, therefore, in each case, look to the statute creating the pension.

Some statutes give the employee the sole right of determining whether he will or will not contribute to the pension fund. Such a statute was involved in *Ball v. Board of Trustees of Teachers Retire-*

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[3] McNevin v. Solvay Process Co., 32 App. Div. 610, 53 N. Y. S. 98 (1898).

[4] Western Union Tel. Co. v. Robertson, 146 Ark. 406; McLemore v. Western Union, 88 Ore. 228, 171 Pac. 390.

[5] See 28 C. J. 151.

[6] See 48 C. J. 792.

[7] *Supra,* note 2.

[8] Revised Statutes of U. S., Sec. 4-747.

*ment Fund*[9] where it was held that if the employee does contribute, a contract relationship arises between the employee and the trustees of the fund, and that the pension is a contract debt. Such pensions would necessarily be subject to garnishment.

Other statutes make the contributions compulsory and incorporate a provision that the pension shall be exempt from attachment, execution, or any other legal process.[10]

Finally there are those statutes creating public pensions, which make contributions compulsory but do not incorporate any exemptions. Such was the statute involved in *Passaic Nat'l Bank etc. Co. v. Eelman.*[11] These pensions are mere gratuities.[12] But when the pension installments mature, the right of the pensioner to payment thereof vests.[13] Any pension installment or installments, which have already matured, are therefore subject to execution. And as was held in *Passaic Nat'l Bank etc. v. Eelman,*[14] such pensions are also subject to garnishment.

The decision in this case was not only just, but also legally sound. It is true that a debt, in the strict legal sense, is an obligation for the payment of money founded upon a contract, express or implied,[15] and that pensions of the type in question do not fit this definition. But, in general use, the word debt means "that which one person is bound to pay to another under any form of obligation."[16] Even a casual reading of the "Garnishee Act" will serve to show that the court was correct when it held that it was the intention of the legislators to use the

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[9] 71 N. J. L. 64, 58 Atl. 111 (Sup. Ct. 1904).

[10] Pensions for police department employees of first class cities, P. L. 1914, p. 244.

Pensions for widows, children and dependents of employees of police departments of first class cities, P. L. 1915, p. 872. Pensions for employees of the boards of streets and water commissioners, P. L. 1915, p. 581, amended by P. L. 1927, p. 218.

[11] *Supra,* note 2.

[12] Bader v. Crone, 116 N. J. L. 331, 184 Atl. 346 (Sup. Ct. 1936).

[13] Plunkett v. Board of Commissioners of Hoboken, 113 N. J. L. 230, 173 Atl. 923 (Sup. Ct. 1934), *aff'd,* 114 N. J. L. 273, 176 Atl. 341 (E.&A. 1935).

[14] *Supra* note 2.

[15] Turner v. Cole, 118 N. J. Eq. 497, 179 Atl. 113 (E. & A. 1935).

[16] Webster's New International Dictionary—2nd ed.

word "debt" in the larger or common sense and not in the restricted legal sense. This alone is sufficient to sustain the court's ruling. But in addition, pensions such as the one in question can be held subject to garnishment, as has been shown, on the strict basis of the law relating to garnishments and to pensions. So that, even if the court erred in the interpretation of the intention of the legislators, still the decision was legally sound.

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MORTGAGES—SUBROGATION—MISTAKE. — The defendants applied for a loan to the complainant, the Home Owners' Loan Corp., and agreed to furnish as security a first lien on their home. The application stated that the incumbrances on the property were a first mortgage, a second mortgage, and a third mortgage held by one N; the application was approved. Through inadvertance, complainant's attorney, who closed the loan (other than the attorney who examined the title), was not informed of the existence of N's mortgage;[1] nor did the defendants inform him of N's mortgage, but on the contrary made affidavit at the time of closing that there were no mortgages open against the property except the first and second mortgages. Complainant paid off the first two mortgages, as well as the municipal liens. Complainant's disbursements were made at the instance and request of the defendants and were made on the understanding and agreement, and with the intention that the complainant's mortgage would be a first lien upon the premises. The complainant's mortgage, by reason of defaults, fell due, and complainant prays that it be subrogated to the liens of the municipality and of the first and second mortgages, and that these liens be revived for the complainant's benefit and be declared prior to N's mortgage and that the premises be sold to raise the amount due the complainant.[2] *Home Owner's Loan Corp. v. Collins,* 120 N.J.Eq. 266, 184 Atl. 621 (Ch. 1936).

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[1] Defendant, N, moved to strike the bill of complaint on the ground that it disclosed no cause of action against him.

[2] Admittedly, there was a mistake due to the carelessness of some employee of the complainant, else the settlement attorney would have been notified of the mortgage. There was also mistake or fraud on the part of the borrowers or they would not have made affidavit that the only liens were the taxes and the first and second mortgages.

Subrogation exists only in favor of one who, to protect his own rights, pays the debt of another. Conventional subrogation arises only upon agreement between the lender and the debtor or old creditor, that the lender shall be subrogated to the old lien. Otherwise the one who advances money to pay a debt cannot be subrogated to the rights of the old creditor.[3] Generally, when the person advancing the money to pay the old debt, takes a new mortgage and the old lien is cancelled, there is no subrogation because the acceptance of the new security evidences an agreement and intention by the new creditor to rely thereon rather than on the old, and because, upon the cancellation of the old lien, nothing remains to be the object of subrogation.[4]

But where, through fraud or mistake, the new security turns out to be defective, there frequently arises a third kind of subrogation. It grows from an agreement or understanding that the subrogee would obtain a security of a particular kind and from his failure through fraud or mistake to obtain such security.[5]

The question is,[6] then, what effect should be given to the complainant's negligence.[7] In considering this, the surrounding circumstances should be studied. The court relied upon past decisions in which relief was granted in cases where the lender's predicament was due to the carelessness of himself or his agent,[8] and quoted from the case

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[3] Seeley v. Bacon, 34 Atl. 139 (Ch. 1896); Gore v. Brian, 35 Atl. 897 (Ch. 1896).

[4] Vaux v. Vaux, 115 N.J.Eq. 586, 172 Atl. 68 (Ch. 1934).

[5] "It does not depend upon the subrogee having been a surety or having had an interest in the property to protect and it does not depend upon an agreement that he would be subrogated to the rights of the old creditor." 120 N.J.Eq. at p. 268, 184 Atl. at p. 622 (Ch. 1936).

[6] See footnote 3, *supra*.

[7] It was argued that the application for the loan and the title search both revealed that N held a mortgage on the property.

[8] In Seeley v. Bacon, *supra*, note 3, money was advanced in complete ignorance of an existing mortgage lien, although a proper search would have disclosed the lien. In Jackson Trust Co. v. Gilkinson, 105 N.J.Eq. 116, 147 Atl. 113 (Ch. 1929), mechanic's liens were prior to a mortgage which by agreement between the mortgagors and a second mortgagee was applied to the payment of an existing first mortgage lien then in default, and about to be foreclosed, and to the payment of municipal tax liens. It was agreed that the complainant's mortgage should be a first lien. Complainant, in examining the mortgagor's title, failed to inspect the mortgaged premises and thus failed to ascertain that a

of *Institute Building and Loan Association v. Edwards*:[9] "That even a clearly established negligence may not, of itself, be a sufficient ground for refusing relief if it appears that the other party has not been prejudiced thereby. * * * Where the act done by mistake is one calculated to induce others to take a line of conduct which will put them to loss if the mistake is corrected, it ought to be clear that the party asking for relief has been led into the mistake in spite of the employment of the highest degree of vigilance. Where, however, no one is injured by the mistake but the party himself, and no one has changed his position by reason of the act executed through the influence of the alleged mistake, I see no reason why the mistake should not be corrected, although the highest degree of vigilance has not been exercised."[10]

In addition, to justify a decree in favor of the complainant (although a study of the facts in the case might justify the view that not only did the complainant fail to exercise "the highest degree of vigilance," but its negligence, in the face of the application and the title search ought to have precluded its relief, for the defendant N was not privy to any fraud which might have been committed by the mortgagors),[11] the court examined the complainant, its creation, the emergency to which it responded, and excused its negligence on the basis of the handicaps under which it operated.[12]

That there was sufficient justification for a decree in favor of the complainant is not questionable. The interpolation of this consid-

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garage was being erected thereon. Complainant was held entitled to subrogation to the rights of the first mortgagee and to the rights of the municipality for municipal tax liens paid, and to that aggregate amount complainant's lien was held prior to that of the mechanic's lien claimant.

[9] 81 N.J.Eq. 359, 86 Atl. 962 (Ch. 1913).

[10] 120 N.J.Eq. at pp. 269, 270, 184 Atl. at p. 623 (Ch. 1936).

[11] See Serial B.&L. and Savings Ass'n. v. Ehrhardt, 95 N.J.Eq. 607, 124 Atl. 56 (Ch. 1924); 5 L.R.A. (NS) 838; 70 A.L.R. 1396.

[12] *Supra*, note 10, "Necessarily, its personnel was hurriedly gathered. The man who must act quickly in an emergency is not required or expected to proceed with the same care as if the situation were quiet and unhurried. So with the complainant. The failure of the complainant to notify the settlement attorney of the existence of N's mortgage is not surprising but is a normal result of the tremendous volume of business which complainant was transacting through its hastily formed organization."

eration, necessarily dicta, leaves the court open to questions of the justification of a decree otherwise clear at law. The rule, then, is that a third person who makes a loan to discharge an existing lien, and who acts under an agreement or understanding that he will obtain a security of a particular kind, will be subrogated to the rights of an old creditor where, through fraud or mistake, the new security turns out to be defective; the revival of the old lien and subrogation will not be defeated by the negligence of the creditor where no other person is prejudiced or has changed his position in reliance on the discharge of the old lien.

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PLEDGE—DUTY OF PLEDGEE TO SELL UPON REQUEST OF PLEDGOR. Defendant executed his demand note to the plaintiff and pledged as collateral security certain stocks. At a time when a sale of the stock pledged would have liquidated the note, the defendant requested the plaintiff to sell the pledged stock. This it refused to do. Action was brought to recover balance due on the note. Defendant counterclaimed and recovered in the lower court on the theory that the plaintiff was negligent in refusing to sell the stock. *Held*—The plaintiff bank, as pledgee, in the absence of a new contract was under no obligation to sell. The pledgor's request could impose no duty on the pledgee to sell. *Franklin Trust Co. v. Goerke,* 116 N.J.L. 529, 185 Atl. 39 (E.&A. 1936).

The delivery of the stock created the general relationship of pledgor and pledgee, giving the pledgor possession of the pledge with power of sale upon default after notice, which power he could exercise at his option.[1] In the absence of an agreement to sell the pledge at a particular time or at maturity, no obligation to sell the pledge can be imposed upon the pledgee.[2]

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[1] O'Neill v. Whigham, 87 Pa. 394 (1878).

[2] First Trust & Deposit Co. v. Potter, 278 N.Y.S. 847 (1935), 77 A.L.R. 382, "In the absence of a contract varying the powers and duties of the parties, as a general rule, the pledgor may not make it the duty of the pledgee to sell by directing or requesting him so to do."

The defendant sought to recover on the theory that the plaintiff was negligent in refusing to sell when requested; but since no duty to sell existed, the defendant could not impose one on the plaintiff. The only duty that the law imposes upon a pledgee is to exercise ordinary care in respect to the thing pledged, and for a breach of that duty only does he become liable.[3] Had the plaintiff, pursuant to the defendant's request, sold in a negligent manner, the defendant could have recovered on the theory of negligence,[4] but the mere failure to sell upon request does not in itself render the plaintiff liable.[5] However, a pledgee has been held liable upon his refusal to sell when requested, when the sale would have liquidated the debt.[6]

In New Jersey there is dictum in one case[7] to the effect that if the amount which could be realized by a sale of the pledge will not liquidate the debt, a condition precedent to the pledgee's liability for refusal to sell upon request is a tender by the pledgor of the difference between the amount that could be realized by a sale and the amount necessary to liquidate the debt. The court in the principal case, however, did not follow the inference of this dicta, even though at the time the request to sell was made, more than enough would have been realized to liquidate the debt.

Although it is settled that the pledgee is under no duty to sell in the absence of a stipulation to that effect, title remains in the pledgor subject to the pledgee's lien. This being so, he is entitled to the value of the pledge subject to the amount necessary to liquidate the debt.

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[3] Cooper v. Simpson, 41 Minn. 46, 42 N.W. 601, 4 L.R.A. 194 (1889).

[4] Jennings v. Moore, 189 Mass. 197, 75 N.E. 214 (1905).

[5] Field v. Leavitt, 37 N. Y. Super. Ct. 215 (1874). Personal property was pledged, pledgor refused to sell at the request of pledgee. *Held*—There being no proof that the refusal to sell was not the exercise of honest judgment by the pledgee having a regard for the interest of all parties concerned, the most that can be shown is that the pledgee made a mistake, but no liability can ensue therefrom.

[6] National Exchange Bank v. Kilpatric, 204 Mo. 119, 102 N.W. 499 (1907). Pledgee held bank stock as collateral and was requested to sell it, but refused to do so and subsequently the bank became insolvent and its stock became worthless. *Held*—Pledgee was guilty of a breach of duty and was liable for the resultant loss.

[7] People's National Bank & Trust Co. of Belleville v. Ginsburg, et al, 108 N.J.L. 415, 156 Atl. 491 (1931).

The pledgor should be permitted to take such steps as are necessary to protect his title, provided that these steps in no way jeopardize or infringe upon the interests of the pledgee. Since the principal case holds that this can not be done by a mere demand on the pledgee to sell, even though the obligation was a demand note which matures at the option of either the holder or the maker, the pledgor should be afforded some remedy in equity because his remedy at law is wholly inadequate, and he must sit idly by and watch the value of his stocks diminish, assuming he has no other funds with which to pay the debt and get back his pledge. Although there is no authority in the books indicating that such a remedy is available to a pledgor in equity, a remedy of the character suggested is available to a surety who can, through a bill in equity, compel a creditor to resort first to the principal debtor's property for collection of the debt, before looking to the surety.[8] It is realized that the pledge relationship and the surety relationship are entirely distinct and have very little in common, yet the writer believes that a sufficient analogy exists between the two to permit equity to entertain a bill by a pledgor praying that the pledgee be directed to sell the securities he holds before their value diminishes to such an extent that the pledgor will suffer irreparable injury. As he has no remedy at law, by which he can protect his interest, equity should take cognizance of this inequitable predicament in which the pledgor finds himself and grant relief.

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TORTS—AUTOMOBILES—NEGLIGENCE—INVITEE AND LICENSEE. — On appeal from a verdict in favor of the defendant, the plaintiff contends that as she was invited by a guest of the driver of an automobile, in his presence and within his hearing, to go riding with the driver and the guest, she was a guest by invitation of the driver of the automobile. *Held,* that as there was no express or implied invitation by the driver the plaintiff was in the status of a licensee and that the decision of the lower court should be affirmed. *Myers v. Sauer,* 116 N.J.L. 254, 182 Atl. 634 (E.&A. 1936).

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[8] Kerr v. N. J. Title Guarantee & Trust Co., et al, 115 N.J.Eq. 388, 170 Atl. 887 (1934); Irick v. Black, 17 N.J.Eq. 189 (1864).

New Jersey courts have, by judicial opinions, adopted and engrafted upon the common law of this state the English interpretation of the terms invitee and licensee as applied to real property. They have also applied the English law of the relative duty of care owed by the owner or occupier of land to trespassers, licensees and invitees. An owner or occupier of land owes the duty to a licensee to refrain from acts wilfully injurious, and to an invitee the duty to exercise ordinary care.[1]

In New Jersey this real property doctrine has been applied with all its niceties and distinctions to the automobile. In *Lutvin v. Dopkus*,[2] the court held that the plaintiffs were licensees and the defendant owed to the plaintiffs the duty merely to refrain from acts wilfully injurious when the evidence presented was that the plaintiffs requested a ride from the defendant who acceded to their request, during which ride the plaintiffs suffered injury.

While this at first blush seems to be a logical and just doctrine, on closer inspection it loses force. The basis of the English differentiation in duty of care owed to trespassers, licensees or invitees is the result of the feudal emphasis placed upon the necessity for social stability in order to maintain the feudal system itself. But today this stability of the social order is not so closely allied to the land. Further, there is no valid reason for the extension of this real property doctrine, aside from convenience in application, to the law of personal property. Secondly, this protection thrown around the occupier of real property is an attempt to limit the liability of the occupier. It would seem unjust and burdensome to make a man liable to the same degree for injuries suffered by a person who should be on his property, without his knowledge, and who is at the most a guest at sufferance, as he would owe to an invited guest. But this very reasoning does not operate in the case of a vehicle. The operator of a vehicle knows that a guest is in or on the vehicle, otherwise the person would be nothing more than a trespasser. It is beyond supposition, because of the peculiar physical nature of an automobile, that a person can be a passenger in an automobile and still be there beyond the knowledge of the operator. In other jurisdictions the courts recog-

[1] Phillips v. Library Co. of Burlington, 55 N.J.L. 307, 27 Atl. 478 (E.&A. 1893).

[2] 94 N.J.L. 64, 108 Atl. 862 (Sup. Ct. 1919).

nize that there is a distinction between the physical characteristics of inert property and those of vehicles. A trespasser or licensee going upon a tract of land, an inert, immovable body, takes it as he finds it, with knowledge that the owner cannot and will not by any act of his start it in motion and hurl it through space in a manner that may mean death to him who enters thereon. When the owner of the vehicle starts it in motion, he takes the life of his guest into his keeping, *a voluntary wilful act,* and in the operation of such car he must use reasonable care not to injure anyone riding therein with his knowledge and consent. The law exacts of one who puts a force in motion that he shall control it with skill and care in proportion to the danger created.[3]

The strongest argument in favor of the *Lutvin* case, *supra,* is the one which supports a differentiation between the duty owed to a trespasser and that owed to a paying passenger; but when an attempt is made to apply the distinction between a licensee and invitee, both gratuitous guests, it is at the most a weak argument. It seems entirely logical that a paying passenger should receive a high degree of care and it is also logical that a trespasser, who might be on the vehicle without the knowledge of the driver, should expect not even the slightest degree of care. But the classification of licensee or invitee, as applied to gratuitous guests in an automobile, implies that the driver has knowledge of their presence on the vehicle. If he didn't have that knowledge the so-called licensee or invitee would slip back into the classification of trespasser. Thus it appears that the only distinguishable difference between a licensee and invitee lies in the magical words "Please ride with me". This difference is slight. It follows, therefore, that if there must be a difference in duty of care to match the difference in relationship, the difference in duty of care owed to an invitee and licensee riding in an automobile should be very slight, in fact almost indistinguishable. Obviously the present New Jersey standard is unjust in that the difference in duty of care between "wilful and wanton" and "ordinary care" is rather sizeable.

Lastly, it appears logical that in the particular case at bar when the passenger asked the plaintiff, in the presence and within the hearing of

[3] Munson v. Rupker, 148 N.E. 169 (Ind. 1925); Robinson v. Leonard, 134 Atl. 706 (Vt. 1926); Black v. Goldweber, 291 S.W. 76, (Ark. 1927); Mitchell v. Raymond, 195 N.W. 885 (Wisc. 1923).

the driver, if she desired to ride with them that this was equivalent to, if not in fact, an express invitation by the driver. The plaintiff had every right to assume from the driver's silence that the invitation emanated from him as well as his passenger. If this were not so, the driver could escape his true responsibility every time he picked up a passenger by merely saying nothing. To permit this to occur would be an injustice and a harsh rule of law.

In view of the foregoing reasons it is submitted that the case was not well decided.

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TRUSTS — ALLOWANCES OF COMMISSIONS — INTERMEDIATE ACCOUNTING.—The trustees of a ten million dollar trust, which was to extend during the lives of specific *cestuis que trustent,* who were well advanced in age at the time of litigation, sought a partial allowance of their statutory commissions on an intermediate accounting. Their account showed that the estate enjoyed the benefit of diligent management, by reason of which accretions inured to the res during the stewardship of the accounting trustees. The court tested the claim for commissions on the basis of the almost complete performance of all the duties which devolved upon the trustees under the trust instrument,[1] and on the further basis of the benefits which accrued to the estate during the fiduciary management of the trustees.[2] *Held*—The court will allow commissions to the trustees to the extent of one-half of one per centum of the value of the corpus.[3] *In re McMillin's*

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[1] *In re* McMillin's Estate, 120 N.J.Eq. 432, 185 Atl. 913 at 915, "In view of the age of the beneficiary it is not to be expected that the trust will continue for the period of thirty or forty years mentioned in the New Jersey Title and Guaranty Trust case, but that it will terminate in a much shorter time. This means that the amount of commissions to be allowed for future services will not be for a very large percentage of the entire life of the trust."

[2] *Supra,* note 1, "In the instant case, the trustees have been active and diligent in handling the corpus of the estate, and under their administration it has increased in value."

[3] *Supra,* note 1. The court herein stated in granting the commissions, "There seems to be no case directly authorizing the payment of commissions to a trustee

*Estate,* 120 N.J.Eq. 432, 185 Atl. 913 (Ch. 1936).

In the early English chancery cases, trustees were not allowed a set and determined maximum commission, but were merely granted an allowance, by the court, of actual expenses incurred in the administration of the estate. The trustee's task was a profitless one at the time.[4] This rule was followed in the early New Jersey cases.[5] Later, however, the New Jersey legislature determined that trustees should be allowed a maximum statutory percentage as compensation for the task which they undertook, with power in the courts to fix a lesser sum.[6] The alternative sum was to be fixed by the trouble and risk incurred in administering the particular res under the circumstances.[7] The statutory rule included many more elements than did the earlier rule, and permitted the factor of profit to enter the trust field. Of course, the sums that were awarded to the trustee were predicated on a filing and acceptance of an accounting simultaneous with, or previous to, the award of commissions.[8] Thus, there was a definite extension of the common law rule which limited the trustee's allowance to actual expenses, to a rule which based allowances on risks and trouble, limited, however, by a fixed statutory maximum.

Since the statute is silent as to the time when commissions are to be awarded, and since compensation was awarded under strict rules at the time of the enactment of the statute, there was doubt after its

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out of the corpus on an intermediate account. . ."

[4] 3 POMEROY, EQUITY JURISPRUDENCE § 1084, "This stringent and certainly unwise rule of the English equity has not been followed in the United States. With very few, if any, exceptions among the various states, trustees as well as executors and administrators, are allowed compensation for their services. In most of the states the right to compensation and the amount of it have been fixed by statutory legislation."

[5] State Bank at Elizabeth v. Marsh, 1 N.J.Eq. 288, at 295 (Ch. 1831), "The cases on the subject from the earliest times are collected in Manning v. Manning, 1 John C. R. 527. In that case the trustees set up the claim to a commission of five per cent. for their care and trouble in the management of the estate, and it was expressly disallowed, the court holding that they were entitled only to charges and expenses, or in the language of the court, 'just allowances.'"

[6] Warbass v. Armstrong, 10 N.J.Eq. 263 (Ch. 1854).

[7] *In re* New Jersey Title and Guaranty Trust Co., 76 N.J.Eq. 293, 75 Atl. 232 (E.&A. 1909). Marsh v. Marsh, 82 N.J.Eq. 176, 87 Atl. 91 (Ch. 1913).

[8] Titsworth v. Titsworth, 107 N.J.Eq. 436, 152 Atl. 869 (Ch. 1931).

adoption as to the power of the court to award compensation on an intermediate accounting. The principal case makes a step forward and allows compensation on an intermediate accounting where the trust res is highly solvent, and the trustee's duties nearly terminated.[9] This is the first reported New Jersey case to allow commissions under such circumstances.

It is noteworthy that coincident with the last extension of the rule, there has been an increased use of the corporate trustee.[10] Ever since the first trust corporation was formed in the 1850's this institution has grown so extensively in its operations that it is now a factor to be considered in any discussion of the allowance of commissions to a trustee. Since banks and trust companies would naturally desire to be paid as soon as possible, it is distinctly to their advantage that they be paid on an intermediate accounting.

The ruling of the principal case is innocuous when limited strictly to cases where the corpus has been augmented, the duration of the trust is imminent, and the amount of the allowance is imperceptible. To these should be imposed the requirement of a highly responsible and solvent trustee. However, an extension of the rule, with more liberal allowances, may lead to cases of temptation to the trustee, who

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[9] *In re* New Jersey Title Guaranty and Trust Co., *supra* note 7, was a case where the trustees attempted to get commissions on an intermediate accounting but were refused on the ground that the trust had too many years to run.

[10] "No comprehensive data are available to show the growth and present extent of trust work carried on by both national and state chartered institutions, although it is known that they are steadily supplanting the individual as trustee." XV ENCYCLOPEDIA OF SOCIAL SCIENCES, 109, sub nom. "Trust Companies."

J. HOLDSWORTH, MONEY AND BANKING, p. 370. "Trust companies have multiplied even more rapidly than banks, partly because they have not been subject to such rigid supervision as national banks especially, but more largely, perhaps, because of the wide latitude involved in the conduct of their business which enables them to meet new financial needs as they come."

"In the present age, distinguished as one of 'large scale production,' and far-reaching economic changes the trust company is playing an important part in the conservation and distribution of the countries wealth."

KIRKBRIDGE, STERRETT, AND WELLIS, THE MODERN TRUST COMPANY, p. 357, "The maintenance of a high standard of service depends to a large extent upon the adequacy of compensation received by the companies." A large portion of this book is devoted to the desirability and need for standard commissions for corporate trustees.

already has been compensated, to perform acts of malfeasance, or to a state of passive nonfeasance. It also may lead to an insufficient corpus in the event that matters beyond the court's perspective, or economic cycles, subsequently affect the corpus to a degree unforseen by the court at the time the commissions were granted. To round out the "danger signs" the court will not allow commissions to a defaulting trustee,[11] but what will it do, where commissions are more liberally allowed than under the premises stated, in the event of a subsequent shortage? The deterrents to an extension of the rule are legion. The court, if it keeps within the limits of the principal case, will not, to a large degree, suffer the effects of any of them. It is a justifiable, sound, and necessary extension of the doctrine of the allowance of commissions to a trustee to allow a moderate commission on an intermediate accounting.

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[11] *In re* Jula's Estate, 3 N.J.Misc. 976, 130 Atl. 733 (Orph. Ct. 1935).