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obligation. Had the subscriber not intended to be legally bound, there would have been neither an occasion for, nor point in, reciting a consideration. It therefore appears that the subscription does show plainly on its face — albeit not as an express statement — the purpose to become legally bound. The clause of qualification in the syllabus, not adverted to in the text of the decision, follows closely the language of the Uniform Written Obligations Act,[19] which has not been adopted by the West Virginia legislature. Does the syllabus state the law?[20] If so, it is arguable that the court has gone far toward adopting the rule pronounced by the Act, without action by the legislature.

From an examination of the case, it seems that the charitable subscription was held unenforceable because under the pleadings and evidence the facts did not fall within the scope of the possible approaches suggested. It is not clear that in a proper case an opposite result might not obtain, predicated either upon a common-law consideration, or upon the doctrine of promissory estoppel. The decision cannot properly be considered an absolute rejection of the enforceability of charitable subscriptions.

It is suggested that the problem of enforceability of charitable subscriptions might best be resolved by wise legislation designed both to protect the primary source of income of charitable institutions, and to preserve from further effacement the orthodox principles of consideration.

K. J. V.

NEGLIGENCE — RAILROADS — DUTY OWING TRESPASSERS AND LICENSEE — EFFECT OF EXCEEDING LICENCE. — *P's* decedent, while sitting or lying on *D's* railroad track in an intoxicated and unconscious condition, was struck and killed, at a point commonly used by pedestrians, by *D's* coal train as it slowly backed around a reverse curve. The lookout maintained by the conductor and brakeman failed to reveal in time the decedent's peril. On appeal from

[19] Uniform Written Obligations Act, § 1, quoted in 1 WILLISTON, CONTRACTS § 219A as follows: "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound." This section is intended to remedy the gap in the law of jurisdictions where by statute the common-law effect of the seal is abolished.

[20] Hardman, *"The Law — in West Virginia* (1940) 47 W. VA. L. Q. 23; *"The Syllabus Is The Law"* (1941) 47 W. VA. L. Q. 141; *"The Syllabus Is The Law" — Another Word* (1941) 47 W. VA. L. Q. 209.

a judgment for *P, held,* one judge dissenting, that P had failed to show any breach of duty owing the decedent, and that decedent became a trespasser when he exceeded his license. *Connelly v. Virginian Railroad Co.*[1]

The West Virginia court[2] follows the generally accepted rule that there is no affirmative duty of care owing a trespasser until after discovery.[3] As to the duty owing the bare licensee or the "constant trespasser over a limited area",[4] there is considerable uncertainty in the West Virginia decisions. Numerous West Virginia cases have followed the rule that the railroad owes them no other or higher duty than it owes to trespassers, namely, to use reasonable care to avoid injuring them after they have been discovered in a place of danger.[5] In a number of these cases, however, there does not seem to be sufficient evidence that the public used the tracks to such an extent as to make the injured person a licensee.[6] But in line with the present tendency to show greater regard for human safety, our court has indicated in several cases that a railroad company is under a duty to exercise greater care for the protection of the licensee than of the trespasser.[7] This view is expressed in the instant case as follows: "For the purposes of this case, the defendant undoubtedly was required in the location of the accident to maintain a reasonable lookout for that class of pedestrians. By acquiescing in their use of its exclusive right of way, it owed them, as distinguished from trespassers, that duty." This view has the support of modern text authorities and of the *Restatement of Torts.*[8]

The determination of the status of the decedent as licensee or trespasser was made unnecessary by the court's finding that as a matter of law there was no breach of duty as to either. This

[1] 20 S. E. (2d) 885 (W. Va. 1942), Riley, J., dissenting.

[2] Ballard v. Charleston Interurban Ry., 113 W. Va. 660, 169 S. E. 524 (1933); Hough v. Monongahela W. P. P. S. Co., 117 W. Va. 272, 185 S. E. 769 (1936); Jones v. Virginian Ry., 116 W. Va. 201, 179 S. E. 71 (1935).

[3] Northern Alabama Ry. v. Elliott, 219 Ala. 423, 122 So. 402 (1929); Smithwick v. Pacific Electric Ry., 206 Cal. 291, 274 Pac. 980 (1929); Young v. South Georgia Ry., 34 Ga. App. 537, 130 S. E. 542 (1926).

[4] RESTATEMENT, TORTS (1934) § 334.

[5] Blagg v. Baltimore & Ohio R. R., 83 W. Va. 449, 98 S. E. 526 (1919); Robertson v. Coal & Coke Ry., 87 W. Va. 106, 104 S. E. 615 (1920); Tompkins v. Sunday Creek Co., 68 W. Va. 483, 69 S. E. 980 (1910).

[6] Huff v. Chesapeake & Ohio Ry., 48 W. Va. 45, 35 S. E. 866 (1900); Spicer v. Chesapeake & Ohio Ry., 34 W. Va. 514, 12 S. E. 553 (1890).

[7] Barron v. Baltimore & Ohio R. R., 116 W. Va. 21, 178 S. E. 277 (1935); Melton v. Chespeake & Ohio Ry., 71 W. Va. 701, 78 S. E. 369 (1913).

[8] HARPER, TORTS (1933) § 95; PROSSER, TORTS (1941) § 78; RESTATEMENT, TORTS § 334.

likewise barred the "last clear chance" doctrine as a possible ground of recovery. The court holds, however, that "An implied licensee upon the tracks of a railroad company who plainly exceeds the purpose for which the license has been allowed by the owner becomes a trespasser."[9] The rule that a licensee who exceeds his license becomes a trespasser is well settled.[10] However, this seems to be the first time the West Virginia court has applied it to facts such as appear in the present case. Other courts have made a similar application of the rule, the Texas court saying: "If the public had a license to use the tracks as a highway, no license can be inferred to use the tracks for sleeping purposes."[11]

D. V. B.

PRINCIPAL AND SURETY — DISCHARGE OF SURETY — NOTICE TO SUE PRINCIPAL — SUFFICIENCY OF NOTICE. — *S* signed, as surety, a note held by *C*. A statute provided that after a cause of action had accrued, "The surety . . . may . . . require the creditor . . . by notice in writing, forthwith to institute suit",[1] and if the creditor does not institute suit within a reasonable time after notice, the surety shall be released.[2] *S* sent C the following notice: ". . . this is to notify you *to collect* his note on which I am endorser . . ."[3] Five years later, *C* brought suit on the note, and *S* claimed release under the statute. *Held*, one judge dissenting, that the notice was insufficient under the statute. *Williams v. Zimmerman*.[4]

Several courts have held a notice "to collect" sufficient under this type of statute,[5] but the majority opinion discounted these holdings as based either on special urgency expressed in the notice, or on the special working of the statute itself. At the other ex-

[9] Syllabus by the court.
[10] Cornett's Adm'r v. Louisville & N. R. R., 181 Ky. 132, 203 S. W. 1054 (1918); Lyons' Adm'r v. Illinois Central R. R., 22 Ky. L. R. 1032, 59 S. W. 507 (1900); Smith v. International & G. N. R., 34 Tex. Civ. App. 209, 78 S. W. 556 (1904).
[11] *Ibid.*

[1] W. VA. CODE (Michie, 1937) c. 45, art. 1, § 1.
[2] *Id.* at § 2.
[3] Williams v. Zimmerman, 20 S. E. (2d) 785, 786 (W. Va. 1942). Italics ours.
[4] 20 S. E. (2d) 785 (W. Va. 1942).
[5] Franklin v. Franklin, 71 Ind. 573 (1880); Iliff v. Weymouth, 40 Ohio St. 101 (1883); Strickler v. Burkholder, 47 Pa. 476 (1864); Sullivan v. Dwyer, 42 S. W. 355 (Tex. Civ. App. 1897). *Cf.* Benge's Adm'r v. Eversole, 156 Ky. 131, 160 S. W. 911 (1913) and Baker v. Whittaker, 177 Ky. 197, 197 S. W. 644 (1917).