

though a survival statute there provided that such a claim should not survive the death of the injured party. Fla. Comp. L. 1927 § 421. It is doubtful, however, if many other state courts will seize upon similar clauses in their constitutions as a wedge for breaking away from the common law rule on survival. Hitherto, such provisions have not been construed to create or afford a remedy not otherwise available. *De May v. Liberty Foundry Co.*, 327 Mo. 495, 37 S.W. (2d) 640 (1931); *Goddard v. City of Lincoln*, 69 Neb. 594, 96 N.W. 273 (1903); *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N.W. 936 (1889).

Clearly, the common law rule is undesirable today. 19 Calif. L. Rev. 289 (1931); Evans, A Comparative Study of Statutory Survival of Tort Claims, 29 Mich. L. Rev. 969 (1931); *Finlay v. Chirney*, L. R. 20 Q. B. Div. 494 (1888); *Hyatt v. Adams*, 16 Mich. 180 (1867); *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S.W. 584 (1914). However, legislative attempts to make a list of those actions which shall and those which shall not survive leave much in doubt, and are a fruitful source of litigation. Evans, A Comparative Study of Statutory Survival of Tort Claims, 29 Mich. L. Rev. 969 (1931). Similarly, decisions such as that in the principal case, which allow the survival of certain actions according to judicial discretion, are partially objectionable in that they create uncertainty as to the status of other actions not within the survival statutes. 48 Harv. L. Rev. 1008 (1935).

Torts—Business Visitors and Invitees—Liability of Steamship Company to “Bon Voyage” Visitor on Steamer—[Federal].—The plaintiff went aboard the defendant company’s transatlantic liner for the purpose of saying good-bye to her friend, who was a passenger. While on the ship, the plaintiff tripped and fell over a companionway negligently left out of repair. From judgment for the plaintiff the defendant appealed. *Held*, judgment affirmed; the plaintiff was a business visitor, rather than a mere licensee, and the defendant was liable to her for negligently leaving the companionway out of repair. *McCann v. Anchor Line Ltd.*, 79 F. (2d) 338 (C.C.A. 2d 1935).

Business visitors are defined as persons on the premises of another for some business-purpose of mutual benefit to both parties. Harper, Torts § 98 (1933); *Milauskis v. Terminal Ry. Ass’n of St. Louis*, 286 Ill. 547, 122 N.E. 78 (1919); *Kidder v. Sadler*, 117 Maine 194, 103 Atl. 159 (1918). The only prior decision involving a visitor aboard a ship under similar circumstances also brought the plaintiff within this definition and held him protected from hazards incident to the condition of the premises. *Powell v. Great Lakes Transit Corp.*, 152 Minn. 90, 188 N.W. 61 (1922). In analogous situations, where friends come onto trains or docks to see passengers, there is a long-standing conflict. Some cases have treated the plaintiff as a business visitor. *Banderob v. Wis. Cent. Ry. Co.*, 133 Wis. 249, 113 N.W. 738 (1907); *Hutchins v. Penobscot Bay & River Steamboat Co.*, 110 Me. 369, 86 Atl. 250 (1903); *Street v. Chicago, M. & St. P. R.R. Co.*, 124 Minn. 517, 145 N.W. 746 (1914). *Contra*, regarding him as a licensee, *Galveston, etc. Ry. Co. v. Matadorf*, 102 Tex. 42, 112 S.W. 1036 (1908); *Hill v. Louisville & Nashville Ry.*, 124 Ga. 243, 52 S.E. 651 (1905); *Duhme v. Hamburg-American Packet Co.*, 184 N.Y. 404, 77 N.E. 386 (1906); *Arkansas & La. Ry. Co. v. Saine*, 90 Ark. 278, 119 S.W. 659 (1909). The Restatement of Torts has classified as business visitors all those making visits incidental to the business relations of the possessor of the land with third persons. Restatement, Torts § 332 (1934). While the Restatement and the Federal court, in the principal case, have taken desirable positions, it is questionable whether the traditional scope of the term “business visitor” permits its application to these per-

sons. It may be true that a passenger on a steamer or railroad expects the privilege of having his friends come to see him off as part of the trip for which he pays. See *Voirin v. Compagnie Générale Transatlantique*, 270 N.Y.S. 643, 644, 151 Misc. 498, 499 (1933). But it does not necessarily follow that there is any benefit to either party in the sense in which the term "business benefit" is usually used. See *Fleckenstein v. Great A. & P. Tea Co.*, 91 N.J.L. 145, 102 Atl. 700 (1917); *Murphy v. Huntley*, 251 Mass. 555, 146 N.E. 710 (1925); and *Pope v. Willow Garages Co.*, 274 Mass. 440, 174 N.E. 727 (1931), where persons accompanying customers to stores or garages, with no intention of doing business there themselves, were held to be mere licensees. The expectation of the parties that the passenger will have visitors does not determine, as the Federal court thought it did, that the plaintiff was a business visitor, but only that, under the circumstances, he should be treated like one for purposes of recovery. It seems that at the expense of taxing the descriptive power of the term "business visitor," protection is being extended to those who might more properly be designated as licensees in the company of business visitors. The tendency to extend the liability of owners for the condition of their premises foreshadows, perhaps, the eventual but desirable abandonment of the distinction between gratuitous licensees, including social guests, and business visitors.

Trusts—Grant of Priority in Bankruptcy to Creditors on Alternative Grounds of Express or Constructive Trust—Distinction between Debt and Trust—[Federal].—The X company maintained an employees' association, the purpose of which was to provide insurance benefits for the employees and their dependents. The association was managed by its own officers and maintained a separate bank account. Membership fees were collected pursuant to an arrangement whereby the X company by bookkeeping entries deducted the necessary amounts from each employee's wages, credited the total deducted to the association, and subsequently paid the association. The company fell behind in its payments but continued to make the deductions. Bankruptcy proceedings were then begun against the X company. At the time the petition was filed there was an arrearage of \$14,607.51, all of which (according to the record) had accrued more than three months before the filing of the petition. The association assigned its claim to the plaintiff, another employees' organization, which claimed, but was denied, a priority in the district court. *Held*, priority granted. The failure of the bank to pay the amounts deducted created a trust *ex maleficio* or, alternatively, the X company was express trustee for the association. *In re Grigsby-Grunow, Inc.*, 80 F. (2d) 478 (C.C.A. 7th 1935).

The arrangement for the collection of dues may be construed as having made the association either the partial assignee or the partial beneficiary of wage contracts between the workers and the X company. Since it appears that the employment contracts themselves, rather than subsequent assignments by the workers, created the rights of the association, the third party beneficiary view is preferable. See 1 Williston, *Contracts* § 347 (1920). But whether the association was an assignee or a beneficiary, the grant of a priority on an express trust theory runs counter to the well-settled rule that a debtor, as such, is not the trustee of his creditor. *Steele v. Clark*, 77 Ill. 471 (1875); see *Gough v. Satterlee*, 52 N.Y.S. 492, 497, 32 App. Div. 33, 40 (1898); 1 Bogert, *Trusts and Trustees* § 17 (1935). This follows from the definition of a trust as a fiduciary relationship in which the *cestui* has an equitable interest in property held for him by the trustee. See *Plum Trees Lime Co. v. Keeler*, 92 Conn. 1, 10, 101 Atl. 509 (1917);