

though the driver violated statutory restrictions concerning speed, license, or age of the driver. *McMahon v. Pearlman*, 242 Mass. 367, 136 N.E. 154 (1922); *Fireman's Fund Ins. Co. v. Haley*, 129 Miss. 525, 92 So. 635 (1922); *Messersmith v. Amer. Fidelity Co.*, 232 N.Y. 161, 133 N.E. 432 (1921). Also under a statute permitting no license to one under eighteen years of age but permitting a person sixteen years old to drive if accompanied by a licensed driver and a clause in the policy excluding liability of the company for injuries caused by a driver "under the age limit fixed by law," recovery has been allowed even though the driver was seventeen years old and unaccompanied. *Brock v. Travelers' Ins. Co.*, 88 Conn. 308, 91 Atl. 279 (1914); *Yorke v. Continental Casualty Co.*, 64 Ont. 109 (1929). The United States Supreme Court went further in allowing recovery by holding that the clause "under the age limit fixed by law" was ambiguous, permitting the construction that it did not include a municipal ordinance. *U.S. Fidelity and Guaranty Co. v. Guenther*, 281 U.S. 34 (1930). *Contra*, *Zolla v. Employers Liability Assurance Corp.*, 251 Ill. App. 197 (1929).

Other courts in construing clauses similar to that in the principal case have seized upon almost imperceptible variations in grammar as bases for conflicting results: Where the clause refused protection to one driving "in violation of law as to age," a driver who violated a restrictive license like the one in the principal case has been denied recovery. *Hudak v. Union Indemnity Co.*, 108 Conn. 598, 143 Atl. 885 (1928). Despite the obvious similarity of the two clauses, the words "in violation of law as to age" were considered as referring to any infringement of the driving age regulations, and thus as not synonymous with the "under the age fixed by law" clause in the principal case. *Cf. Morrison v. Royal Indemnity Co.*, 180 App. Div. 709, 167 N.Y.S. 732 (1917); *S. & E. Motor Hire Corp. v. N.Y. Indemnity Co.*, 255 N.Y. 69, 174 N.E. 65 (1930); but see *Bitzer v. So. Surety Co.*, 245 Ill. App. 295 (1924). The dissent in the principal case was based on the clause in the statute, "No person shall operate . . . a motor vehicle . . . unless he is duly licensed." Cahills Cons. L. N.Y. 1930, c. 64-a, § 20. Although this clause adds nothing, as it would clearly be implied in any license statute, its omission in a statute amending and repealing one which contained such a clause has also been made the basis of a decision allowing recovery against an insurance company. *Mannheimer Bros. v. Kansas Casualty Co.*, 147 Minn. 350, 180 N.W. 229 (1920); *cf. Maryland Casualty Co. v. Friedman*, 45 F. (2d) 369 (C.C.A. 8th 1930); see also *Wagoner v. Fidelity and C. Co.*, 215 App. Div. 170, 213 N.Y.S. 188 (1926). It seems questionable whether the inclusion of such a provision is of itself a sufficient foundation on which to rest a contrary decision. The decision of the principal case seems more desirable in that it gives effect to the general policy of requiring insurance companies to make very clear any risk which they seek to exclude.

Insurance—Mutual Companies—Effect of Retroactive By-law under Reserved Power—[New Jersey].—The insured's life insurance certificate expressly reserved the right to bind members by subsequently enacted by-laws. After the insured had disappeared, the defendant society enacted a by-law to the effect that absence for seven years without communication would not entitle any beneficiary to recover until the full term of the member's life expectancy had expired, provided that up to such expiration premiums had been duly paid. The plaintiff, as beneficiary, after presenting proof to the society of the insured's unexplained absence for seven years, brought this action

to recover on the certificate even though the insured's life expectancy had not expired. *Held*, for the defendant. The presumption of death after seven year's absence cannot be applied under this contract. *Kopacka v. Roman and Greek Catholic Gymnastic Slovak Union Sokol*, 186 Atl. 56 (N.J. 1936).

Power to amend by-laws is inherent in a mutual insurance society. *Mutual Life Ass'n v. Kentner*, 188 Ill. 431, 58 N.E. 966 (1900). And new by-laws may be retroactively binding on all members especially when, as in the principal case, the member has expressly agreed to be bound by existing and future by-laws. *Fullenwider v. Supreme Council*, 180 Ill. 621, 54 N.E. 485 (1899). But even when clearly so intended, not all such by-laws can operate retroactively. Mere administrative changes which do not fundamentally alter the contract are universally allowed, (Vance, Insurance § 74 (2d ed. 1930)), but a retroactive by-law amendment cannot limit or repudiate an express promise to pay a fixed death benefit as that would be destruction of the essence of the contract. *Supreme Council v. Getz*, 112 Fed. 119, 121 (C.C.A. 3d 1901); *Supreme Council v. Black*, 123 Fed. 650 (C.C.A. 3d 1903). *Contra*, *United Order of Foresters v. Miller*, 178 Wis. 299, 190 N.W. 197 (1922). However courts have allowed an increase in premium rate, saying that such a change avoids insolvency and thereby preserves the investment as nearly as possible in accordance with the original intention of the parties. *Supreme Lodge v. Mims*, 241 U.S. 574 (1916); *Livingston v. Cypher*, 243 Mich. 500, 220 N.W. 721 (1928). *Contra*, *Wright v. Maccabees of the World*, 196 N.Y. 391, 89 N.E. 1078 (1909). Disclaimer of liability for suicide while insane is held void as an invasion of a reasonably contemplated protection. *Shipman v. Protected Home Circle*, 174 N.Y. 398, 67 N.E. 83 (1903). But retroactive by-laws avoiding liability in cases of suicide while sane, death from intemperance and debauchery, and death from smallpox without vaccination are valid. *Burt v. Union Central Life Ins. Co.*, 187 U.S. 362 (1902); *St. Mary's Ben. Soc. v. Burford's Adm'r*, 70 Pa. 321 (1872); *Sovereign Camp W.O.W. v. Woodruff*, 80 Miss. 546, 32 So. 4 (1902). Since these risks are abnormal they may be avoided without contravening the probable intention of the parties. Fundamentally, therefore, the exertion of retroactive by-law power, even when expressly reserved, is circumscribed by the implied requirement that this exertion be reasonable.

The majority of cases, in opposition to the principal case, have held that a by-law abolishing the seven-year presumption of death and requiring the beneficiary to pay premiums throughout the life expectancy of the insured, is not binding on the prior members. In jurisdictions where such presumption is expressed in a statute, this by-law has been held void as an agreement in violation of a statute. *Bennett v. Modern Woodmen*, 52 Cal. App. 581, 199 Pac. 343 (1921); *Samberg v. Knights of Modern Maccabees*, 158 Mich. 568, 123 N.W. 25 (1909). In other jurisdictions it has been held void as an attempt to force new procedural rules on the court. *Haines v. Modern Woodmen*, 189 Iowa 651, 178 N.W. 1010 (1920); *Hannon v. Grand Lodge*, 99 Kan. 734, 163 Pac. 169 (1917). The lack of merit in these arguments is apparent when it is realized that parties may change rules of evidence to some extent by contract, and that an established rule of evidence gains no added sanctity from statutory expression. See Wigmore, *Contracts to Alter or Waive Rules of Evidence*, 16 Ill. L. Rev. 87 (1921). In the specific case at hand, therefore, the fundamental issue is still one of reasonableness. The majority of cases holding such a by-law unreasonable argue that since it was possible to establish the fact of death by this presumption when the contract was

made, forcing a probably dependent beneficiary to pay premiums for the balance of the insured's life expectancy is a material change in the value of the promised benefit. *Modern Woodmen v. White*, 70 Colo. 207, 199 Pac. 965 (1921); *Roblin v. Supreme Tent*, 269 Pa. 139, 112 Atl. 70 (1920); *Fryer v. Modern Woodmen*, 179 N.W. 160 (Iowa 1920); *Sweet v. Modern Woodmen*, 169 Wis. 462, 172 N.W. 143 (1919).

The instant case joins a small minority in finding the by-law reasonable on the practical basis that in the large percentage of the "disappearance" cases the insured is in fact alive and the member is either attempting to defraud the insurance company or has deserted his family. *Steen v. Modern Woodmen*, 296 Ill. 104, 129 N.E. 546 (1921); *McGovern v. Brotherhood of Locomotive Firemen and Engineers*, 31 Ohio C. C. 243 (1909) aff'd, 85 Ohio 460, 98 N.E. 1128 (1911). This is especially true of mutual companies where many members are migratory workmen. The insurance is against death not desertion. These courts point out that disappearance does not have the same value in indicating death as it did when the presumption was formulated because then travel was hazardous. Excellent communication and police records render unlikely actual death being uncommunicated. These factors have led to a weakening of the presumption of death in at least one state. In New York it is now necessary to prove that death was the "probable cause" of uncommunicated absence before the presumption can be invoked. See *Buller v. Mutual Life Ins. Co.*, 225 N.Y. 197, 121 N.E. 758 (1919). Seemingly, therefore, in spite of the present weight of authority, it is becoming increasingly more difficult to say that future retroactive by-laws like the one in the principal case were not reasonably within the intention of the parties.

Mortgages—Effect of Appointment of Rent Receiver on Existing Leases—[Illinois].—The plaintiff, who had been appointed receiver to collect rents on the mortgagee's behalf pending foreclosure, sued a tenant to compel payment of rent under a lease made with the mortgagor subsequent to the mortgage and without the mortgagee's consent. The tenant contended that the appointment of the receiver terminated the lease. *Held*, for the plaintiff. The appointment of a receiver constitutes taking of possession by the court, not by the mortgagee, and does not constitute an eviction. *First Nat'l Bank of Chicago v. Gordon*, No. 38867, not yet reported (Ill. App. 1936).

The instant case is the first Illinois decision on the point. For a thorough discussion of the problem, see Tefft, *Receivers and Leases Subordinate to the Mortgage*, 2 Univ. Chi. L. Rev. 33 (1934).

Patents—Applicability of Notice Provision to Non-manufacturing Patentees—[United States].—In a suit by the plaintiff for patent infringement, the defendant counterclaimed for infringement of its patent. The defendant had not manufactured the patented article and had not given the plaintiff any notice of the patent until the filing of the counterclaim. Section 4900 of the Revised Statutes provides: "It shall be the duty of all patentees . . . and all persons making or vending any patented article . . . to give sufficient notice . . . that the same is patented . . . by fixing thereon the word 'patented.'" It further provides that any party "failing so to mark" shall recover damages for only those infringements occurring after notice. R. S. § 4900, 35