RECENT CASES

BANKS AND BANKING—NATIONAL BANKS—CONSTITUTIONALITY OF STATUTE CREATING PREFERENCES AMONG CREDITORS—A Pennsylvania statute provides that in liquidating an insolvent trust company, priority is to be given to the depositors over other creditors.[1] Both a trust company and a national bank became insolvent on the same day. The trust company owned 93 per cent. of the stock of the national bank. The receiver of the latter claimed that the liability of the trust company upon the stock which it owned entitled him, under § 23 of the *Federal Reserve Act*,[2] to share *pari passu* with the depositors; that the state act preferring depositors impaired the efficiency of the national banking system and was unconstitutional. *Held:* The statute is constitutional and depositors have priority. *In re Cameron*, 287 Pa. 560, 135 Atl. 295 (1926).

Since national banks are instrumentalities of the Federal Government, created by statutes for a public purpose,[3] it is axiomatic that any state act which either impairs the efficiency of this agency or expressly conflicts with those statutes is unconstitutional.[4] But by the very nature of their daily business, national banks are governed far more by laws of the state than of the nation. All their contracts, their acquisitions and transfers of property, their right to sue and liability to be sued are based on state law.[5] In the principal case, the state declared the order in which the assets of a corporation were to be distributed. The dissenting judge reasoned, on analogy to the tax cases, that when a national bank is numbered among the creditors, the influence exercised by the state could be carried to such an extent as to arrest the national power entirely: the power to prefer is the power to exempt from liability.[6] Although the problem raised in the principal case seems never before to have been decided, on principle the conclusion of the majority of the court seems the sounder. The statute is not in express conflict with the federal statute, the sole effect of which is to make the national bank a creditor of its stock-

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[1] Act of 1913, P. L. 354, 355, PA. STAT. (1920) § 6341.

[2] 38 STAT. (1913) 273, U. S. COMP. STAT. (1918) § 9689.

[3] Davis v. Elmira Savings Bank, 161 U. S. 275 (1895); Christopher v. Norvell, 201 U. S. 216 (1905); First. Nat. Bank v. California, 262 U. S. 366 (1923); First Nat. Bank in St. Louis v. Missouri, 263 U. S. 640 (1924).

[4] Easton v. Iowa, 188 U. S. 220 (1902); Allen v. Carter, 119 Pa. 192 (1888) (criminal statute making it a misdemeanor for bank cashier to engage in other business did not apply to national banks); BURDICK, THE AMERICAN CONSTITUTION (1922) § 168; COOLEY, CONSTITUTIONAL LIMITATIONS (6th Ed. 1890) 28.

[5] Nat. Bank v. Commonwealth, 9 Wall. 353 (U. S. 1869), in which the court said at 362: "It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional"; McClellan v. Chipman, 164 U. S. 347 (1896) (statute prohibiting preferences by an insolvent debtor is constitutional and applies to preferences given to a national bank).

[6] 287 Pa. at 571, 135 Atl. at 298, citing McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819). In that case, Marshall, C. J., said at 487: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create . . . are propositions not to be denied."

holders.[7] The state admittedly governs all the contracts by which a national bank secures rights, and it is uniformly held that the regulation of priorities between creditors is not an impairment of the obligation of contracts.[8] Debts to the United States have been subordinated to personal exemptions given to debtors by statute.[9] It cannot, therefore, be said that the statute under construction is analogous to a taxing statute, or that it impairs the utility of an instrumentality of the Federal Government.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE REGULATION OF INTRASTATE BUSINESS OF MOTOR BUS ENGAGED IN INTERSTATE COMMERCE—A statute forbids the operation of any motor vehicle upon a public way in any city or town for the carriage of passengers for hire so as to afford a means of transportation similar to that afforded by a railway company, by indiscriminately receiving and discharging passengers along the route on which the vehicle is operated, without first obtaining a license from the cities through which it is operated. No license is required in respect to such carriage as may be exclusively interstate.[1] The defendant, the Holyoke Street Railway Company has been a common carrier of passengers by street railway in Massachusetts. Plaintiff is engaged in the business of transporting passengers for hire by motor vehicle and operates busses between Hartford, Connecticut, and Greenfield, Massachusetts. Both classes of passengers, intrastate and interstate, are carried in the same vehicles. The operation of the busses in competition with the street railway has resulted in substantial loss to the latter. Plaintiff has not obtained a license from any of the cities and towns served by the street railway company; and that company has caused plaintiff's employees to be arrested and prosecuted and intends to continue to do so. The plaintiff brought suit to restrain the enforcement of the statute as in conflict with the commerce clause of the Constitution of the United States. *Held:* The statute is constitutional. *Interstate Busses Corp. v. Holyoke Street Ry. Co.*, U. S. Sup. Ct., decided January 3, 1927.

No regulation has been enacted by Congress respecting motor bus and motor truck transportation, and so the states, within their respective jurisdic-

[7] The language of the Federal Reserve Act, *supra* note 2, is: "The stockholders of every national banking association shall be held individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein, at the par value thereof, in addition to the amount invested in such stock."

[8] Abilene Nat. Bank v. Dolley, 228 U. S. 1 (1913); Central Trust Co. v. Charlotte, etc., R. R., 65 Fed. 257 (C. C. D. S. C. 1894); Ellerbe v. United Masonic Benefit Ass'n., 114 Mo. 501, 21 S. W. 843 (1892).

[9] Fink v. O'Neil, 106 U. S. 272 (1882); Jones' Estate, 84 Pa. Super. 170 (1924) (a claim of exemption under the Fiduciaries Act of 1917 was held valid as against a debt of decedent due to the United States).

[1] Mass. Gen. Laws (1921) c. 159 § 45, as amended by Acts, 1925 c. 280 §§ 1-3. The statutory provisions in question have been sustained by the highest court of Massachusetts: New York, etc., R. R. v. Deister, 253 Mass. 178, 148 N. E. 590 (1925); Burrows v. Farnums Stage Lines, 254 Mass. 240, 150 N. E. 206 (1926).

tions, have power to act in matters local in nature admitting of different systems of regulation drawn from local knowledge and conforming to local wants,[2] subject to the limitation implied from the interstate commerce clause of the Constitution that they cannot legislate as to matters "imperatively demanding a single uniform rule," [3] and that in general they cannot directly interfere with or burden interstate commerce regardless of the purpose for which the legislation was enacted.[4] The Supreme Court has decided that interstate motor transportation does not require such uniformity of regulation as to prevent all state regulation. Reasonable state regulations concerning the use of its highways have been sustained in the interest of public safety even as to interstate vehicles.[5] The fact that the obtaining of a certificate of convenience and necessity cannot be required by the state authorities so far as interstate commerce is involved[6] does not invalidate the requirements of the statute so far as they are within the power of the state. The present statute is restricted to intrastate vehicles. The purpose of the act is to regulate local and intrastate affairs. While the purpose of the act is immaterial, if it directly burdens interstate commerce, the burden is on the party contesting its constitutionality to show that it operates to prejudice interstate carriage of passengers. Although the present statute does, after a fashion, interfere with the interstate commerce of the plaintiff, yet the court felt that the interference, if any, is slight; that it would be reasonably practical for the plaintiff to separate the two classes of business so as to carry interstate passengers in busses used exclusively for that purpose; and that the plaintiff should not be allowed to evade the act by the mere linking of its intrastate to its interstate transportation or by unnecessary transportation of both classes by means of the same instrumentalities and employees.

CONSTITUTIONAL LAW—POWER OF EITHER HOUSE TO COMPEL ATTENDANCE OF WITNESSES—The defendant ignored a subpœna which commanded him to appear and testify before a Senate committee which was investigating the administration of the Department of Justice. He was then taken into custody by order of the Senate, whereupon he obtained a writ of *habeas corpus* on which he was discharged from custody by the lower court. *Held:* The defendant was properly held in custody and the lower court erred in discharging him. *McGrain v. Daugherty,* 47 Sup. Ct. 319 (U. S. 1927).

In this decision, which reverses *Ex parte Daugherty,* 299 Fed. 620 (S. D. Ohio 1924), the Supreme Court lays down the principle that the Senate or House

[2] Cooley v. Board of Wardens, 12 How. 299, 318 (U. S. 1851). See also the language of Mr. Justice Hughes in Minnesota Rate Cases, 230 U. S. 352, 399 (1912).

[3] Language of Mr. Justice Curtis in Cooley v. Board of Wardens, *supra* note 2.

[4] Shafer v. Farmers Grain Co., 268 U. S. 189, 199 (1924); Real Silk Mills v. Portland, 268 U. S. 325, 336 (1924).

[5] Hendrick v. Maryland, 235 U. S. 610 (1914); Kane v. New Jersey, 242 U. S. 160 (1916).

[6] Buck v. Kuykendall, 267 U. S. 307 (1914). The fact that in this case the highway in question had been built with federal aid has been held not determinative. See Bush v. Maloy, 267 U. S. 317 (1924).

"has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution." The case is in accord with practically all cases which have been decided in the United States and in England. For a complete discussion of the question involved and a thorough review of the historical background and the English and American authorities, see Potts, *Power of Legislative Bodies to Punish for Contempt,* 74 U. OF PA. L. REV. 691, 780 (1926).

CORPORATIONS—DISSOLUTION—EFFECT OF PRIOR ADJUDICATION OF BANKRUPTCY—The defendant corporation was adjudicated bankrupt. Subsequently the State's attorney brought an action for its dissolution. Certain stockholders intervened, questioning the jurisdiction of a state to dissolve a corporation which at the time was in the hands of a trustee in bankruptcy. *Held:* The court had jurisdiction to dissolve the corporation. *State v. Farmers' Co-op. Packing Co.,* 211 N. W. 602 (S. Dak. 1926).

The court's reasoning proceeded along the line that there was no conflict in jurisdiction between the judgment of dissolution and the authority of the bankruptcy court, since the dissolution of a corporation is a province that is peculiar to the state and the adjudication in bankruptcy with the consequent distribution of assets are matters within the cognizance of the federal government. And, insofar as the judgment of dissolution appoints a receiver to distribute the assets of the corporation among the stockholders, the authority and functions of the receiver are postponed and supplementary to the trustee's distribution. It is well settled that mere bankruptcy does not work a dissolution of a corporation.[1] It is also settled that a dissolution of a corporation will not bar a subsequent adjudication in bankruptcy.[2] Conversely, the principal case holds that an adjudication of a corporation will not bar a later dissolution. It is of unusual interest since it seems that only one similar case has heretofore arisen.[3] The conclusion of the court appears to be sound and logical, in view of the following considerations: (1) since the state is the creator of a corporation, it can destroy the existence of the corporation for cause; (2) there is no conflict in the spheres of the federal and state duties; and (3) though the corporation be dissolved, the trustee can still be assisted by the officers in gathering the assets. The decision, however, may be attacked on the grounds that the dissolution of a bankrupt corporation is a vain and useless insistence on a

[1] Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1 (1896); Chamberlin v. Huguenot Mfg. Co., 118 Mass. 532 (1875); 1 REMINGTON, BANKRUPTCY (2d Ed. 1915) § 451½.

[2] *In re* Independent Ins. Co., 6 Nat. B. R. 169 (D. C. Mass. 1872); White Mountain Paper Co. v. Morse, 127 Fed. 643 (C. C. A. 1st, 1904); 1 REMINGTON, *op. cit. supra* note 1 § 101; BLACK, BANKRUPTCY (4th Ed. 1926) § 230.

[3] Hart v. Boston R. R., 40 Conn. 524 (1873). In BLACK, *loc. cit. supra* note 2, is the following: "This may be a correct doctrine, so far as regards a mere decree of dissolution. But no federal court could be expected to admit that the process of the state court could extend to property within its control, or in any manner regulate its administration or distribution. For the jurisdiction of a federal court, once attaching in bankruptcy proceedings is not coordinate with that of the state courts, but superior and exclusive."

legal right by the state, since bankrupt corporations normally die a natural death and the action for dissolution merely hastens that ending with no apparent benefit; that the public needs no protection against the corporation because bankruptcy is a public act; and, finally, that the federal authorities have exclusive control of the assets.

CORPORATIONS—INCORPORATION OF PARTNERSHIP—LIABILITY ON CONTRACT OF LATTER—This suit was brought to recover damages for wrongful discharge in breach of an alleged contract of employment. Four partners, doing business as A. B. Kirschbaum & Co., entered into a contract of employment with the plaintiff, calling for sixty days notice by either party, in the event of a desire to terminate. The agreement was signed in the partnership name by one partner and its terms were known to one other partner. There was no dispute as to the authority to bind the firm. A year later, the partners incorporated, becoming the four principal officers and holding nearly all of the stock. The corporation continued to employ the plaintiff for eleven years and then discharged him without giving the notice stipulated in the old agreement. The defense of the corporation was that the obligation was not created by a majority of the promoters and adopted by the corporation with knowledge thereof. *Held:* The contract was entered into by a majority of the promoters, and the corporation, since it did not disaffirm it, was bound. *Moskowitz v. A. B. Kirschbaum Co.*, 89 Pa. Super. 274 (1926).

As a general rule, a corporation is not bound on the contracts of its promoters,[1] but it may become liable on a new contract containing similar terms. The courts variously refer to the theory of liability as ratification, adoption, novation, or the acceptance of an open offer.[2] Save for certain cases, presently to be mentioned, it is essential that the corporation by express words or conduct, indicate an intention to be bound.[3] The idea that a corporation could become obligated on contracts made by a majority of its promoters, for services necessary in the organization of the company, by the mere formal act of incorporation and perforce the acceptance of the benefits of past labors, was first expounded in a group of English cases decided by Lord Cottenham.[4] Despite the fact that these cases have been so seriously criticized in England as to be of scant value as precedent,[5] New Hampshire, Pennsylvania, Iowa and Nebraska have adopted the doctrine.[6] Pennsylvania has evidently gone further

[1] Park v. Modern Woodmen, 181 Ill. 214, 54 N. E. 932 (1899); Bond v. Atlantic Terra Cotta Co., 137 App. Div. 671, 122 N. Y. Supp. 425 (1910). In some states, by statute, a corporation is liable for the expenses of incorporation.

[2] Richards, *Liability of Corporations on Contracts Made by Promoters,* 19 HARV. L. REV. 97 (1905).

[3] Whitney v. Wyman, 101 U. S. 392 (1879); Pratt v. Oshkosh Match Co., 89 Wis. 406, 62 N. W. 84 (1895).

[4] Edward v. Grand Junction Ry. Co., 1 Myl. & Cr. 650 (1836); Stanley v. Chester & B. Ry. Co., 9 Sim. 264 (1838); Webb v. L. & P. Ry. Co., 9 Hare 129 (1851).

[5] Richards, *supra* note 2.

[6] Stevenson v. Dubuque Level & Lead Co., 34 Iowa 577 (1872); Low v. R. R., 45 N. H. 370 (1864); Clarke v. Omaha, etc., Ry. Co., 5 Neb. 314

than the other jurisdictions by applying the principle to a case involving a contract of promoters calling for services to be rendered *after* incorporation.[7] The court in the principal case cites these decisions, and decides the case on the ground that an authorized contract made by one partner is the contract of all four, and knowledge of its terms is imputable to all of them. A majority of the promoters therefore did in fact make this agreement. The notion that a majority of promoters must unite in the promise is logically spurious and not generally accepted.[8] The true ground of liability, as was stated above, being the formation of a new contract on terms similar to the old, what difference should it make whether one or all of the promoters entered into the agreement?

GIFTS CAUSA MORTIS—REVOCATION BY SUBSEQUENT BIRTH OF CHILD TO DONOR—This was an action by an administrator to recover on certificates of stock in the defendant building and loan association. Prior to and in anticipation of her death the decedent handed the stock to one *A* as a gift to *B*, to be delivered to the latter upon the death of the donor. Before her death, a child was born to the donor. *Held:* The gift to *B* was not affected by the subsequent birth. *McCoy v. Shawnee Building and Loan Association*, 251 Pac. 194 (Kan. 1926).

No authorities have been found to support the position taken by the court. A New York case,[1] which seems to be the only authority dealing with the subject, sustains the opposite conclusion, namely, that the subsequent birth of a child revokes a gift *causa mortis*. In most states, statutes provide that the birth of a child under such circumstances revokes a will.[2] The New York court first decided that a gift *causa mortis* was in effect a will[3] and from that premise proceeded to its conclusion on an analogy to the laws of wills. The early Roman law[4] provided that the birth of a child revoked a will previously made; in the English ecclesiastical courts this created a presumption that the testator did not intend such a will to take effect if a child should be born.[5] At common law, however, such an event did not so operate.[6] The

(1877); Bells Gap R. R. v. Christy, 79 Pa. 54 (1875); Tift v. Quaker City Nat. Bank, 141 Pa. 550, 21 Atl. 660 (1891).

[7] Girard v. Case Bros. Cutlery Co., 225 Pa. 327, 74 Atl. 201 (1909). *Cf.* Bonner v. Travelers Hotel Co., 276 Pa. 492, 120 Atl. 467 (1923).

[8] See 17 A. L. R. 469, Note (1922).

[1] Bloomer v. Bloomer, 2 Bradf. Sur. 339 (N. Y. 1853).

[2] PAGE, WILLS (2nd Ed. 1926) § 489.

[3] It would seem that the court's premise is incorrect. A gift *causa mortis* takes effect immediately subject to being divested by revocation or by the donor's recovery. However, a will has no legal effect at the date of its execution, its efficacy depending on the testator's death. Therefore, the two dispositions are clearly distinguishable. See McCoy v. Shawnee B. and L. Ass'n, 251 Pac. at 196.

[4] Dig., Lib. 28, Tit. 3 § 3.

[5] Johnson v. Wells, 2 Hagg. Eccl. 561 (1829); Fox v. Marston, 1 Curt. Eccl. 494 (1837).

[6] 1 PAGE, *op. cit. supra* note 2 § 479.

court in the principal case pertinently directed attention to the fact that the effect of the child's birth in the will cases is entirely provided for by statute, and since such statutes made no mention whatever of gifts *causa mortis*, no intention to cover the latter situation can possibly be deduced, either directly or by analogy. In view of this consideration the decision in the principal case is based on good logic and sound reason.

INFANTS—DISAFFIRMANCE OF CONTRACT—COUNTERCLAIM FOR DETERIORATION—Plaintiff, while still an infant, misrepresented to the defendant company that he was of age, and the latter, relying thereon, in good faith made a contract for the sale to him of an automobile. The plaintiff made part payments of the price of the car to the extent of $406. On coming of age the plaintiff disaffirmed the contract and sued for the return of the $406. The defendant set up as a counterclaim the amount of $525, which had been expended on the returned car to put it in as good condition as when it was sold to the plaintiff. *Held:* The defendant's counterclaim should be upheld for as much of the amount paid for the repair of the car as would equal the plaintiff's claim. *Myers v. Hurley Motor Co.*, U. S. Sup. Ct., decided Jan. 3, 1927.

The court reached its decision by the application of the equitable maxim, "he who seeks equity must do equity," and by the further consideration that in this case there had been actual fraud on the part of the infant. To make an infant account for the benefit he has received from the use of the property and for any injury to it, seems only just, when the contract is fair and reasonable. The minority view, represented by England, Maryland, New York and Oregon, does not consider that the rights of infants are violated by permitting the seller an allowance for depreciation of the subject matter of the contract in suits similar to the principal case.[1] The rules for the protection of infants, it is held, are to be used as a shield, not as a sword. The majority of courts are opposed to the principal case, and permit an infant to recover sums paid on contracts, except for necessities, even though he has used the chattel so as to render it worthless.[2] These jurisdictions emphasize the protection of infants, and refuse to allow indirectly by way of recoupment what could not be secured directly in a suit against the infant by the seller. Two jurisdictions, Minnesota and New Hampshire, permit the seller an allowance for depreciation of the returned chattel where the contract has been fair, reasonable, and *provident*, taking into account the infant's situation.[3] So it was held provident for one infant to make a contract for a multigraph machine, and he had to make an allowance to the seller for its deterioration.[4] On the other

[1] Valentini v. Canali, 24 Q. B. D. 166 (1889); Adams v. Beall, 67 Md. 53, 8 Atl. 664 (1887); Wanisch v. Wuertz, 140 N. Y. Supp. 573 (1913); Pettit v. Liston, 97 Ore. 464, 191 Pac. 660, 11 A. L. R. 487 (1920).

[2] Arkansas Reo Motor Car Co. v. Goodlett, 163 Ark. 35, 258 S. W. 975 (1924); Hauser v. Marmon Chicago Co., 208 Ill. App. 171 (1917); Gillis v. Goodwin, 180 Mass. 140, 61 N. E. 813 (1901).

[3] This view is favored in 1 WILLISTON, CONTRACTS (1920) § 238.

[4] Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191 (1916).

hand it was held improvident for another infant in a particular situation to purchase an automobile, and he was allowed to recover the whole sum paid.[5] The decision in the principal case based on the deterioration of the property used by the infant, coupled with his misrepresentation, seems more satisfactory than the view of the majority giving the infant an absolute right to recover under all circumstances.

INSURANCE—MUTUAL COMPANIES—TAXATION OF LEGAL RESERVE—The plaintiff, a mutual life insurance company, had accumulated a legal reserve of $186,000,000, of which $70,000,000 had been derived from paid-in premiums of policyholders. The company in its report for the War Excess Profits Tax assessment[1] included the legal reserve as invested capital. The Collector of Revenue held that the legal reserve was not invested capital under the Act, which exempted as invested capital the cash value of "shares or stocks" in corporations or partnerships.[2] This ruling excluded the legal reserve, and thus reduced the invested capital of the company to a figure where it bore such a relation to the income as to make the latter subject to the tax. *Held:* The actual paid-in legal reserve ($70,000,000) was invested capital. *Duffy v. Mutual Benefit Life Ins. Co.*, 47 Sup. Ct. 205 (1926).

The theory of the court was that the term "shares or stocks" as used in the Act was not limited only to corporations having a capital stock, or to partnerships, but that it clearly covered the interests of members in joint-stock companies and, likewise, mutual companies. The legal reserve never represented indebtedness any more than the capital of a stock corporation represents indebtedness. The member bore a relation to the mutual company analogous to that which a stockholder bears to the joint-stock company in which he holds stock. While no cases have been found in which the exact question here raised has been adjudicated, numerous decisions have worked out the interest of members of mutual companies in a manner similar to the reasoning in the principal case. It has been held that the mutual company, in so far as the interest of its policyholder is concerned, resembles the ordinary corporation in relation to the stockholder therein.[3] Other courts have held that the interest of a member in a mutual company is somewhat in the nature of a partnership interest. The insured becomes a member of the company by virtue of his policy, entitled to a share of the profits, and responsible for losses to the extent of his premium paid, or agreed to be paid.[4] This analogy has not been carried to the extent of holding that membership is attended by all the liabilities of a partnership.[5] Since courts have considered the member

[5] Lavoie v. Wooldridge, 79 N. H. 21, 104 Atl. 346 (1918).

[1] Revenue Act of 1917, 40 STAT. 306 § 207a, U. S. COMP. STAT. (1918) § 6336⅜h.

[2] *Ibid.*

[3] Huber v. Martin, 127 Wis. 412, 105 N. W. 1031 (1906); 2 MAY, INSURANCE (4th ed. 1900) 549.

[4] *Cf.* Schimpf & Son v. Lehigh Valley Mutual Ins. Co., 86 Pa. 373, 376 (1878); Given v. Rettew, 162 Pa. 638, 640, 29 Atl. 703, 704 (1894).

[5] Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. L. 444 (1874); Cohen v. N. Y. Mutual Life Ins. Co., 50 N. Y. 610, 624 (1872).

of a mutual company as having a share or interest similar to that of a shareholder in a corporation, or, as some have held, an interest analogous to that of a member of a partnership, and since the Statute clearly regards as invested capital the paid-in value of stock in a corporation or of a share in a partnership, it is suggested that the court in the principal case properly held that the paid-in legal reserve was invested capital, and, therefore, that the plaintiff was exempt from the tax.

LANDLORD AND TENANT—ASSUMPTION OF RISK ARISING FROM DANGEROUS PREMISES—The defendant was a landlord, maintaining a bath room for the common use of the persons to whom he let his rooms. The bathroom contained a gas heater and was unventilated. The wife of the plaintiff, a tenant, was injured by asphyxiation. Two of the defenses were that the defendant was ignorant of the danger of the existing condition, and that since the condition existed when the tenancy began and had remained unchanged, the plaintiff assumed the risk of the danger. *Held:* Plaintiff can recover. *Gobrecht v. Beckwith,* 135 Atl. 20 (N. H. 1926).

A landlord who has reserved control over part of his property for the common use of several tenants owes them the duty of seeing that such part is maintained in a reasonably safe condition.[1] But he is not liable unless he has notice of the defect, or knowledge of facts from which such notice would be implied.[2] Where the tenant has such knowledge and continues to occupy the premises, he is considered to have assumed the risk and cannot recover for injury resulting therefrom.[3] In the present case the court decided that there was sufficient evidence of the defendant's negligence and that he had knowledge of the dangerous situation, and that as a matter of law the existence of the condition at the beginning of the tenancy did not cause the tenant to assume the risk. This last part of the holding was based on the authority of *Kambour v. Boston & Maine R. R.*[4] In that case a boy was injured in jumping from a moving train, and the court decided that the mere voluntary encounter of a known danger was not sufficient to cause him to assume the risk so as to relieve the negligent defendant; that there must be some direct expression, to the person who owes the duty, of the intention to assume the risk. The opinion there cites some of the English master and servant cases which support this doctrine. These cases are grounded on the theory that the servant's necessities create a pressure which destroys his free will, when he is placed in a position where he must either encounter probable danger or give up his employment.[5] The American cases have denied this effect.[6] If it be

[1] Dunster v. Hollis [1918] 2 K. B. 795; Johnson v. Lembeck Brewing Co., 75 N. J. L. 282, 68 Atl. 85 (1907); Lewin v. Pauli, 19 Pa. Super. 447 (1902).

[2] Lynch v. Swan, 167 Mass. 510, 46 N. E. 51 (1897); Augevine v. Hewitson, 235 Mass. 126, 126 N. E. 425 (1920); Dollard v. Roberts, 130 N. Y. 269, 29 N. E. 104 (1891).

[3] Quinn v. Perham, 151 Mass. 162, 23 N. E. 735 (1890); Marston v. Andler, 80 N. H. 564, 122 Atl. 329 (1923); Rooney v. Siletti, 96 N. J. L. 312, 115 Atl. 664 (1921).

[4] 77 N. H. 33, 86 Atl. 624 (1913).

[5] Bohlen, *Voluntary Assumption of Risk,* 20 HARV. L. REV. 14 (1906).

[6] *Ibid.*

assumed that the doctrine of the *Kambour* case is sound, should it be applied to the present case? There may well be circumstances such as house shortage, economic necessity, or sickness where the pressure causing the tenant to continue encountering a danger should be taken into account. In the principal case, however, the condition existed when the tenancy began and the reason for the rule does not seem to apply. It is submitted, therefore, that the case presents a misapplication of a doctrine which the majority of American courts do not recognize.

TORTS—TRESPASS AB INITIO—UNLAWFUL ACT OF PROHIBITION OFFICER AFTER RIGHTFUL ENTRY—Federal officers, acting under a valid search warrant, seized a quantity of liquor on the defendant's premises. Instead of keeping the property seized as required by law, only one quart was retained and the rest summarily destroyed by the officers. At the trial, the defendant objected to the introduction of the quart in evidence on the ground that the unlawful act of the agents in destroying most of the property seized made their original entry unlawful and the agents trespassers *ab initio;* and so the result would be that the liquor sought to be introduced was obtained unlawfully by federal officers and should therefore be excluded in accordance with the rule in the federal courts. *Held:* The liquor retained was properly received in evidence. *McGuire v. United States,* U. S. Sup. Ct., decided January 3, 1927.

In refusing to permit the ancient holding of the *Six Carpenters' Case*[1] to be invoked to defeat a prosecution by the government for illegal possession of liquor, the Supreme Court affirms a doctrine established by several recent cases in federal courts.[2] Although some federal decisions have given slight support to the contrary holding,[3] the weight of authority and better reason[4] seem to enunciate principles in accord with the principal case. Several early American cases,[5] in applying the doctrine of trespass *ab initio,* have used language to the effect that when an officer enters one's premises by authority of law, since one is bound to admit him and can make no provision for one's own security, an abuse of the legal power constitutes a forfeiture of the whole protection which the law gives to the act which it allows. The general terms used in these cases appear to be responsible for the minority holdings in the federal courts, which, it is submitted, fail to recognize the fact that the doctrine of trespass *ab initio* was a legal fiction created solely for the purpose of

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[1] 8 Coke 146 (1610).

[2] Hurley v. United States, 300 Fed. 75 (C. C. A. 1st, 1924); United States v. Clark, 298 Fed. 533 (S. D. Ala., 1924); In re Quirk, 1 F. (2d) 484 (W. D. N. Y. 1924); CORNELIUS, SEARCH AND SEIZURE (1926) § 152.

[3] Godat v. McCarthy, 283 Fed. 689 (D. C. Mass., 1922); Murby v. United States, 293 Fed. 849 (C. C. A. 1st, 1923); United States v. Cooper, 295 Fed. 709 (D. C. Mass. 1924).

[4] *Supra* note 2. *Cf.* People v. Schregardus, 226 Mich. 279, 197 N. W. 573 (1924).

[5] Esty v. Wilmot, 15 Gray 168, 169 (Mass, 1860); State v. Moore, 12 N. H. 42 (1841); Allen v. Crofoot, 5 Wend. 507 (N. Y. 1830).

making possible a civil action of trespass against officers acting in excess of their authority.[6] Where the original entry is without any authority of law, it is well settled that evidence obtained thereby is excluded.[7] But where the original entry is under authority of law, the citizen would appear to be adequately protected against an abuse of authority on the part of the officer by having a civil action against the officer for the damage caused and by the officer's criminal responsibility.[8] At least, the court in the principal case did not feel that his protection should be increased to the extent of depriving the government of the benefit of evidence lawfully seized and retained.

TRUSTS—STATUTE OF FRAUDS—ORAL AGREEMENT TO SPECULATE IN LAND—The plaintiff and defendant entered into an oral agreement to buy and sell a tract of land and divide the profits equally. The agreement further provided that the plaintiff would contribute his services in connection with the negotiations and that defendant would supply the purchase money, taking title to the land in his own name. This plan was accordingly carried out and the defendant subsequently conveyed the property for a nominal sum to a corporation of which the stock was nearly all owned by him. The land rose considerably in value and the plaintiff sued for a division of the profits that would probably have been realized had not the defendant breached his oral contract. *Held:* The plaintiff could not recover because the agreement was within the Statute of Frauds.[1] *Davis v. Hillman,* 288 Pa. 16, 135 Atl. 254 (1926).

Oral agreements pertaining to real property are within the exact purview of the Statute of Frauds,[2] except, by the weight of authority, when they are entered into by partners.[3] In such a case the interests of the partners are interests in contingent profits and not interests in land and therefore not subject to the Statute.[4] The court in the principal case held the oral agreement

[6] Smith, *Surviving Fictions,* 27 YALE L. J. 147, 164 (1917).

[7] Weeks v. United States, 232 U. S. 383 (1914); Gouled v. United States, 255 U. S. 298 (1921); Amos v. United States, 255 U. S. 313 (1921).

[8] 40 STAT. 228 (1917) § 21, U. S. COMP. STAT. (1918) § 10496¼u.

[1] 1 SM. L. (1772) 389 § 1, PA. STAT. (1920) § 20192; P. L. 533 § 4 (1856), PA. STAT. (1920) § 20193.

[2] For an interesting account of the history of the English Statute see Henning, *The Original Drafts of the Statute of Frauds and Their Authors,* 61 U. OF PA. L. REV. 283 (1913). For list of states where the Statute is in force, see BOGERT, TRUSTS (1921) 55, n. 77; PERRY, TRUSTS (6th Ed. 1911) § 78, n. 1.

[3] Thompson v. McKee, 43 Okla. 243, 142 Pac. 755 (1914); GILMORE, PARTNERSHIP (1911) 94, n. 80 and cases there cited. *Contra:* Goldstein v. Nathan, 158 Ill. 641, 42 N. E. 72 (1895).

[4] Howell v. Kelly, 149 Pa. 473, 24 Atl. 224 (1892). See BROWNE, STATUTE OF FRAUDS (5th Ed. 1895) §261a, for an excellent explanation of this subject.

[5] Davis v. Hillman, 288 Pa. at 21, 135 Atl. at 256. Professor Mechem puts it thus: " . . . a single, isolated, casual purchase of land or chattels, by persons not otherwise partners, with a view not to deal in the property as a business, but merely to hold it until it can be sold at an advance, can rarely be deemed to create a partnership." MECHEM, PARTNERSHIP (2d ed. 1924) 415.

created no relation of partnership or joint adventure and used the following language:[5] ". . . the land was not to be purchased for common account,[6] nor was any portion of the consideration paid by the plaintiff,[7] nor did any liability for possible losses attach."[8] It being assumed that no partnership was created, the case then resolves itself into the question of whether a valid oral trust can be created in land. Where there is an oral agreement to hold land in trust, and if the land be sold to hold the proceeds in trust, a valid trust as to the proceeds is created, if the land has been converted into money.[9] But where the agreement remains executory, the promisor not having sold the real property nor accounted for its proceeds, the breach of contract by the promisor will not make him a constructive trustee; and the promise, furthermore, is voidable under the Statute of Frauds, a breach of it not being fraud.[10] It would, therefore, seem that the court in the principal case was correct in holding that the plaintiff was not entitled to recover, since no actual profits were ever realized by the defendant. There was, however, a dissenting opinion which endeavored to distinguish the principal case from the general rule, on the ground that the defendant, in transferring the property for a nominal consideration to the corporation, made the performance of his agreement with the plaintiff impossible, and thereby rendered himself liable as a party failing to fulfill his contract. Such analogy would be sound provided there was an enforceable contract. But, since an oral agreement to keep land in trust for another is, under the Statute of Frauds, unenforceable,[11] it is submitted the anology cannot be properly drawn.

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[6] Is it, however, necessary that the land be purchased for common account? See LINDLEY, PARTNERSHIP (9th Ed. 1924) 415.

[7] But is it not sufficient consideration that one party puts his services or labor or skill or learning against the money or property of the other? See Chowing v. Graham, 74 Okla. 232, 178 Pac. 676 (1918).

[8] Yet the right to participate in profits normally implies a corresponding liability for losses. Richardson v. Keely, 58 Colo. 47, 142 Pac. 167 (1914). GILMORE, *op. cit. supra* note 3, at § 11, ". . . sharing profits is prima facie evidence of the existence of a partnership." See UNIFORM PARTNERSHIP ACT § 7 (4).

[9] Craft v. Craft, 74 Fla. 262, 76 So. 772 (1917); Mohn v. Mohn, 112 Ind. 285, 16 N. E. 859 (1887); Chace v. Gardner, 228 Mass. 533, 117 N. E. 841 (1917). *Contra:* McGinnis v. Barton, 71 Iowa 644, 33 N. W. 152 (1887); White v. McKenzie, 193 Mich. 189, 159 Pac. 367 (1916).

[10] Pearson v. Pearson, 125 Ind. 341, 25 N. E. 342 (1890); Byers v. McEnery, 117 Iowa 499, 91 N. W. 797 (1902); Grantham v. Conner, 97 Kan. 150, 154 Pac. 246 (1916); Walters v. Walters, 172 N. C. 328, 90 S. E. 304 (1916). *Contra:* Bier v. Leisle, 172 Cal. 432, 156 Pac. 870 (1916).

[11] *Ibid.*