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PREFERENCE OF A STATE AS A CREDITOR.

The Court of Appeals of New York, in the case of *In re Carnegie Trust Co.*, 99 N. E., 1096, decided in November, 1912, held that the State had succeeded to the prerogative right to have its debts preferred to those of ordinary creditors, which the English Crown had at common law. In this case the bank was insolvent, and the State Superintendent of Banks, by authority of the New York Banking Law (Consol. Laws, 1902, C. 2) had taken possession of the insolvent bank. While he was winding up its affairs, the State Treasurer put in the State's claim for $97,000, the amount of the State's unsecured deposit, and demanded that it be preferred over the claims of other depositors. The referee denied this preference, and the Special Term confirmed his report; but the Appellate Division (136 N. Y. Supp., 466) reversed the order of the Special Term and the Court of Appeals decided in favor of the State. There is no statute giving the State this priority in New York, but the Court held that under their Constitution they adopted the common law of England as it was in April, 1775, except such parts as were repugnant to the Constitution. It is admitted by every authority that at common law the King was entitled to this preference. *Bac. Abr. title Ex'r K.*, 734; 3 *Black. Com.*, 420; 1 *Kent Com.*, 248. The argument of the Court is

that the King and his personal prerogatives are abrogated as repugnant to the Constitution; but "his sovereignty, powers, functions and duties, in so far as they pertain to civil government, now devolve upon the people of the State," and therefore the people of the State as sovereign are entitled to this preference. The idea that the people of the State had succeeded to all the rights of the English Crown had been held on other questions. *Wendell v. Jackson,* 8 Wend., 183; *People v. Kerkimer,* 4 Cowen, 345; *Lansing v. Smith,* 4 Wend., 9.

The principal case acknowledges there is a direct conflict on this question. Many States have settled it by express statutes giving the State priority to a greater or less extent. *Conn. Rev.,* 1902, Sec. 288; *Mass. Rev.,* 1902, C. 163, Sec. 118; *R. I. Rev.,* 1909, Sec. 1238; *Maine Rev.,* 1903, C. 72, Sec. 42; *Ohio Rev.,* 1910, Secs. 10714, 11138; *Wash. Rem. & Ball. Statutes,* Sec. 1568; *Fla. Rev.,* 1906, Sec. 2404. Pennsylvania, oddly enough, has a statute passed in 1794, "which directs debts due to the State from deceased persons shall be *last* paid." *Commonwealth v. Lewis,* 6 Binn., 266. Louisiana seems to have had such a statute before 1825, but the Code of 1825 expressly took away all preferences to the State. *State v. Wright's Admr.,* 8 Mart. (N. S.), 316. The preference of the United States, Justice Story says, "does not stand upon any sovereign prerogatives, but is exclusively founded upon the actual provisions of their own statutes." *United States v. State Bank of N. C.,* 6 Peters, 29.

In the principal case the Court says, "We thus find our Court fully committed upon the question under discussion," referring to *Central Trust Co. v. N. City & N. R. R. Co.,* 110 N. Y., 250, decided in 1888. But that was a much stronger case for the State in that the claim of the State was for taxes due while a receiver was operating the road for the mortgagees. That case and the principal case go back to a mere dictum, in the case of *Receivership of the Columbian Ins. Co.,* 3 Abb. Dec. Ct. of App., 239, decided in 1866. In this case too, the claim of the city was for personal taxes, and although it was "unnecessary to express an opinion on this question," Judge Porter said, "there is great force in the argument in support of the broad proposition, that the people of this State have succeeded to all the prerogatives of the English Crown, so far as they are essential to the efficient exercise of powers inherent in the nature of civil government, and that there is the same priority of right here, in respect to the

payment of taxes, which existed at common law in favor of the public treasury." But it should be noticed that this—the beginning of the doctrine in New York—is but a dictum, and is made only to extend to taxes. The New York rule was formulated very carefully by its Court of Appeals in 1897, in *Wise v. Wise & Co.*, 153 N. Y., 507. The Court said in that case: "In this country," the right of a State to be preferred "exists only in two cases. (1) Where the preference is expressly given by statute, and (2) where before the fund has come into the hands of the receiver or trustee, a warrant or some other legal process has issued for the collection of the tax or debt, and the fund has come into his hands impressed with a lien in favor of the Government in consequence of the proceedings for collection." Where there is no statute or lien, "there is no controlling authority for preferring such a claim (for taxes which had become due subsequent to the attachment by a creditor) over specific prior liens in favor of creditors obtained by levy under attachments or executions." The principal case says this case only settles that a simple claim of the State is not to take preference over prior specific liens. It seems as though this case holds also that a simple debt due the State as in the principal case is not entitled to preference, for the facts of the principal case surely do not come under either of the two single instances in which alone *Wise v. Wise & Co., supra,* holds the State is entitled to priority. This surely is the way the Federal District Court interpreted *Wise v. Wise & Co.* in *Robinson v. Mutual Reserve Life Ins. Co.*, 175 Fed., 624. In that case, in 1909, the Court denied the State's prior claim for taxes, since there was no statute, and it had not been charged by a tax lien before insolvency. In 1911 the Federal Court had occasion again to construe *Wise v. Wise & Co.*, and denied that the State succeeded "as sovereign to all the prerogatives of the British Crown, among others the right to a preference for debts due it over all other creditors. It has been expressly held that taxes due the State have no priority of payment out of a fund in Court for distribution, unless the priority was expressly given by statute, or unless the fund has come into Court impressed with a priority for the tax." The Court in the principal case did not refer to these two recent decisions in the Federal Court as to the law of New York, and their idea as to the meaning of *Wise v. Wise & Co.* It is hard to see how the principal case does not overthrow the rule of *Wise v. Wise & Co.*

Whether the rule giving the State a preference is in force in a State merely by the adoption of the common law is, indeed, as the New York Courts found it, and as said in *In re Devlin,* 180 Fed., 170, an "extremely doubtful and difficult question." It came squarely before the Georgia Court in *Robinson v. The Bank of Darien,* 18 Ga., 65, and the Court said it "constituted a branch of the common law of England, and as such was adopted in this State by the Act of 1774." They admitted it could not exist with all its English incidents, but their argument is that it is necessary, to protect the revenue of the State, and "to enable the State to accomplish the ends of its institution." In a later case, *Seay v. Bank of Rome,* 66 Ga., 609, they say: "it has been the well settled rule in Georgia from the organization of its government as an independent sovereign State down to the present time that debts due her have priority." Tennessee in 1907 expressly held this royal prerogative "was a part of the common law transmitted to this State from North Carolina," in *Fidelity & Guaranty Co. v. Rainey,* 120 Tenn., 357.

Maryland has had several interesting cases on this subject. The earliest case on it, *Davidson v. Clayland,* 1 Har. & J., 546, in 1805, decided that the State was entitled to a preference, but based the opinion on an old statute of 1778, which gave the State a prior lien as soon as it commenced a suit. But in *Smith v. State,* 5 Gill, 45, in 1847, it is laid down flatly that the State is a preferred creditor from the adoption of the old common law; with no mention of a statute in the opinion. This is reiterated and treated as settled law in *State v. Baltimore,* 10 Md., 504, and in *Orem Ex'x v. Wrightson,* 51 Md., 34, and in equity, in *Green's Estate,* 4 Md. Ch., 349. The great case in Maryland and perhaps the leading one on the subject, is *State of Maryland v. Bank of Maryland,* 6 Gill & J., 205, decided in 1834. The State had deposited $50,000 in the bank, and claimed priority to the funds in the hands of a trustee for creditors. The Court said the rule giving the State priority was well settled; it was "too late to deny it now. It is not inconsistent with the principles or spirit of our political institutions; it is not opposed to a sense of right that the interests of all should prevail over that of an individual when it can be asserted without disturbing vested rights." But this case was decided against the State because of a very important limitation put on the rule by this case. They hold that a *bona fide*

assignment for the benefit of creditors "protects the property in the hands of the trustee against the common law priority of the State." They enforced this rule against the State in 1905 in *State v. Williams,* 101 Md., 529.

This rule that a *bona fide* assignment to a trustee for creditors, whereby the debtor entirely divests himself of control and title, defeats this priority of the State or Crown, is established in England. *King v. Watson,* 3 Price, 6. Wyoming, in *State v. Foster,* 5 Wyo., 199, enforced this limitation of the rule, defeating the State's claim to priority, but saying, "it is not necessary to decide that the common law prerogative of the King in this respect is applicable in this country—on which the authorities are conflicting." The Federal Court, while expressly saying they would not decide whether the common law as to priority of the sovereign was in force or not in Kansas, would not give a preference to the State, for there had been a general and legal assignment for the benefit of creditors. *In re Devlin,* 180 Fed., 170. Whether the principal case would come under this limitation of the rule or not is doubtful. There surely was not a voluntary assignment for the benefit of creditors, and yet the entire assets of the debtor were taken away from it and vested for the benefit of all the creditors in a trustee or receiver, whom the law arbitrarily appointed. It would hardly seem that the State would voluntarily do an act which would *ipso facto* defeat its priority, and yet on the reasons assigned by the cases, the total relinquishment of the debtor of all control over his property and the dedicating of it to all his creditors generally, to be divided equally, before the State has asserted its priority, it almost seems the same effect should flow from this involuntary assignment that would from a voluntary one. The same result attaches when a receiver is appointed at the request of creditors. *Middlesex Co. v. State Bank,* 30 N. J. Eq., 311. The principal case never mentioned this phase of the rule, confining itself to a scanty review of its own decisions merely.

Returning again to the consideration of whether by adopting the common law simply, this rule was adopted so as to favor the State, instead of the Crown, we find it is denied strongly in South Carolina in two cases decided by the same judge, although one was in law and one in equity. *State v. Harris,* 2 Bailey, 598; *Klinck v. Kleckley,* 2 Hill (Eq.), 250. The same rule is laid down in *State v. Cleary,* 2 Hill, 600. In *State v. Harris, supra,* the judge waxes eloquent and rhetorical in his denial of this com-

mon law privilege. "It cannot be that the incidents of royalty are to adhere to the vestal of republicanism, when she has trod the diadem of kings under her feet and broken the sceptre of power." He admits the sovereign can pass laws giving itself this preference, but it is not an incident before it is willed, or why, he asks with a good deal of force, should the United States have to assert it by an express statute? "Taxes," he adds, "debts which are due to the State as a sovereign for the protection of both the citizen and property, are entitled to a preference." Michigan in 1910 refused to hold that such a priority exists without a statute, in *Zimmerman v. Chelsea,* 127 N. W., 351. New Jersey decided *contra* to the principal case in *Freeholders of Middlesex County v. State Bank,* 30 N. J. Eq., 311. They say in this case, if it existed, it is queer it had never been exercised in over a hundred years; and if they adopt it at all they would have to adopt it in all its "iron rigor," for it has not been modified by statute. They deny it absolutely, but also hold the State is not entitled to it here in any event, for there had been a receiver appointed, which divested the debtor of title and defeated any priority the State might have had, even under the English rule.

The principal case is to be distinguished from a line of cases where the public moneys were deposited in violation of law and then mingled with general assets. In these cases the State is held to have a preferred claim on the ground of a trust; the public money is held by the bank as a trust fund which the general creditors cannot reach. *State v. Bruce,* 102 P. (Idaho), 831; *State v. Throm,* 6 Idaho, 323.

It can be seen that there is a hopeless conflict on this question. The difficulty of settling it judicially is shown by the decisions in New York. The simplest way to settle it seems to be by statute; it seems a case peculiarly calling for a statutory regulation, as most of the points in insolvency and bankruptcy are regulated in this way. As to whether by adoption of the common law merely this prerogative was given to the State, there seems to be about the same amount of authority and reason on either side, as far as taxes are concerned, at least.

VOLUNTARILY INCURRING DANGER TO SAVE LIFE OF ANOTHER PERSON AS CONTRIBUTORY NEGLIGENCE.

In the recent case of *Perpich v. Leetonia Mining Co.,* 137 N. W., 12, it was held, that a person who voluntarily attempted to rescue

one whose life was imperiled by the negligence of another might recover therefor from the negligent person if the act of attempted rescue was not extreme recklessness.

The plaintiff in the principal case left a position of safety and attempted to rescue one who had been placed in a perilous situation through the defendant's negligence. The plaintiff was injured in the explosion which followed. The Court said that the act of the plaintiff was not negligence *per se*. This decision seems to be in accord with the weight of authority both in England and the United States. The law recognizes the duty of everyone to society in general, and justifies the assuming of greater risks to protect human life than would be sanctioned under other circumstances. In this class of cases the "duty" is more of a moral obligation, than a legal duty.

In the case of *Eckert v. Long Island R. R. Co.*, 43 N. Y., 503, a man rescued a boy at the sacrifice of his own life, from an approaching train. His widow brought an action against the railroad company, which had been negligent in running its train at a higher rate of speed than that allowed in the town. The plaintiff recovered judgment. In the opinion the Court said: "The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless the exposure is clearly rash and reckless." In the case of *L. & N. R. R. Co. v. Orr*, 121 Ala., 489, the Court said that risking one's life in an effort to save the life of another cannot be said to be a rash and reckless act if the appearance justifies a belief that he can effect a rescue, even though he shall also have a reason to believe, and in fact does believe, that he may fail or receive grievous injury himself.

These two decisions are among the leading American authorities on this subject and indicate that the Courts do not scan very closely the grounds of hope a person may have in going into danger in order to save others, where exigency demands instantaneous decision and action. There are expressions in some of the cases, however, to the effect that the intervention must be in circumstances where the intervener can act "without incurring great danger to himself." This undoubtedly is an erroneous test. The "duty" or "obligation" does not become any the less by the greater imminency of the danger. The act may be instinctive, or deliberate, and should be justified in either case if there is a *bona fide* attempt to save life or limb. It has been justly said that there is no legal duty on the plaintiff to rescue one who is in

danger of loss of life, and it is clear that in the Eckert case *supra*, the child could not have maintained an action against the plaintiff's husband for not rescuing it; his act was purely voluntary, but it was justifiable, and the negligence of the defendant was not. In the case of *Donahoe v. Wabash R. R. Co.*, 83 Mo., 560, it was held that the railroad company could not be made liable for injuries suffered by one who, with the most praiseworthy motive, rushed in front of a train to rescue another who was unlawfully on the track, the train being managed prudently. In this case neither party was at fault and there could be no recovery.

The privilege of rescue under obvious danger is not to be extended to cases in which mere property is imperiled, or even, it has been held, to the rescue of sensitive animals, such as horses; although taking a moderate degree of personal risk ought not to be considered a fault. *Deville v. Southern & R. Co.*, 50 Cal., 383. The general rule therefore seems to be that it is not contributory negligence *per se* for one with reasonable prudence to expose himself to danger, for the purpose of saving his own or another's property from injury. *Luming v. Illinois Central R. R. Co.*, 81 Iowa, 246. In the case of *Taylor v. Home Tel. Co.*, 163 Mich., 458, the employees of the defendant company negligently removed a cock from a city water main, and permitted the water to flow into the apartment in which the plaintiff was a care taker. The plaintiff, in attempting to close the window through which the water was entering, became soaked with the water and illness followed. The Court found that she had deliberately walked into the water, the maxim *volenti non fit injuria* applied, and that she was not entitled to recover. It would seem therefore that the sound rule upon which recovery is based depends upon the reasonableness of the plaintiff's act.

The justification for the act in attempting to rescue one whose life is in danger is, that the negligence of the defendant working through a person's feelings has caused him to act. In so risking his own life he does not become a volunteer if the act is not one of extreme recklessness. One text writer justifies the act on the ground that the employer has given an implied order, in case of danger to life, to assist as much as possible. This "implied order," if you can choose to call it by that name, arises from the general duty to perserve human life, and the right to recover for injuries received in attempting to save life or property which has

been imperiled by the negligence of another depends upon the reasonableness of the act.

GARNISHMENT OF THE CONTENTS OF A SAFETY DEPOSIT BOX.

The Supreme Court of Rhode Island in the recent case of *Tillinghast v. Johnson,* 82 Atl., 788, reaches the conclusion that a safety deposit company is subject to garnishment as to contents of a box which it receives in the ordinary course of business, though it neither knows nor is expected to know what those contents are, and the owner of the box alone has the key.

Garnishment is a proceeding by which plaintiff in action seeks to reach the choses in action of defendant by calling into Court some third party who has such effects in his possession or who is indebted to the defendant. 20 *Cyc.,* 978.

The cases are not numerous which involve the question of the garnishment of the contents of a safety deposit box or safe.

In the case of *National Safe Deposit Co. v. Stead,* 250 Ill., 584, it is held that the relation between a safety deposit company and lessee is that of bailee and bailor. The fact that the company does not know and is not expected to know the character and the description of the property deposited does not change that relation.

The Courts which follow the doctrine of the principal case assume that the relation between the depositor and depositary is that of bailor and bailee, and that therefore there is possession in the safety deposit company which will subject it to a garnishment process. *Washington, etc., Co. v. Susquehanna Coal Co.,* 26 App D. C., 149.

The Court in the case of *Trowbridge v. Spinning,* 23 Wash., 48, states: "At any time on the request of the defendant the garnishee could put it within the power of the defendant to remove the contents of the box and the defendant could not remove the contents without the consent and active coöperation of the garnishee. As against the defendant then the garnishee had control of the contents of the box."

The leading case in support of the doctrine *contra* to that of the principal case is *Gregg v. Hilson,* 8 Phila., 91, which holds that the contents of a safety deposit compartment of which the depositor held the keys, and which by the contract of rental the

company had no right to enter, are in possession of the depositor, and the depositary cannot be charged as garnishee.

In the case of *Gregg v. Hilson, supra,* the Court said: "They are not a debt due to the defendant or a deposit of money made by him, or goods or chattels pawned, pledged or demised. The contents of the safe are in the actual possession of the renter of the safe. They have not been deposited with or demised to the company."

"In the ordinary course of their business safe deposit companies rent safes or boxes in their vaults to depositors, engaging to maintain a guard over the vaults but retaining no right of access in themselves. It does not receive the deposits personally as in the case of special bank deposits, but on the contrary the depositor himself places his property in his safe and removes it at his pleasure, the company being ignorant of what if any property is in the box or safe. Can it be said in any true sense that the company is in possession of the property or that there has been a delivery? If there is no possession and no delivery there is no bailment." *Hale on Bailments,* p. 248.

Property in the vaults of a safe deposit company is subject to seizure by direct attachment. *United States v. Graff,* 67 Barb., 304.

Rood, in his work on garnishment, Sec. 54, note, states the rule to be in accord with that stated in the principal case, and cites *United States v. Graff, supra.* This, however, would appear to be error, since in that case the action was one of attachment and not garnishment.

His statement of the requisites of an action of garnishment indicates the inability to garnishee. "Control must be active and exclusive of defendant. Mere constructive possession or right of disposition is not enough. Unless the property sought to be garnisheed is in the actual control of garnishee so that he can dispose of it at will he cannot be charged. Actual personal possession is not necessary in order to charge the garnishee. Possession of an agent is enough. Nor is it necessary that the garnishee have any right to withhold the property from the defendant, nor to move or handle it, provided he has it in his power to do so." *Rood on Garnishment,* Sec. 52.

The cases are conclusive of the proposition that a possession is requisite to garnishment. *Bottom v. Clarke,* 7 Cush. (Mass.), 487.

In the case of *Trowbridge v. Spinning, supra,* there was a

statute relating to garnishment which statute gives greater powers of investigation than those ordinarily accorded by statutes of other States.

It is stated in 20 *Cyc.*, p. 1022, that according to the weight of authority property or funds deposited with a safety deposit company cannot be reached by garnishment proceedings, which is *contra* to the doctrine stated in the principal case.

It is difficult to justify the theory of the Court in the principal case. Possession has never passed from the owner or renter. Why should its proprietor be deemed to have possession of the effects of his tenant any more than the ordinary landlord? The safety deposit company is a mere custodian for hire. Its duties do not depend on a bailment relation, but on one of a contract to guard.