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PRIORITY AS BETWEEN CORPORATE MORTGAGES AND JUDGMENTS FOR TORTS ARISING FROM CONTRACT.

It has been stated as a general rule that where contract relations exist, the parties assume towards each other no duties whatever besides those which the contract imposes. *Cooley, Torts* 106; *McGuire v. Kiveland*, 56 Vt. 62. To this proposition there are the two principal exceptions that on a false warranty either an action in tort or for breach of contract may be maintained and the case of common carriers who are obliged by law to carry safely and are liable in tort for their failure to do so as well as for breach of contract. *Railway Co. v. Kemp*, 61 Md. 619. But though such is the general rule as between the parties to the contract, it is recognized by high authority that where an act is actionable only between the wrong-doer and one person as a breach of contract, yet the wrong-doer may be responsible for the same act as a tort to another who is thereby injured. *Osborne v. Morgan*, 130 Mass. 102.

The distinction between actions of tort and contract has become of great importance in cases arising under legislation subordinating the liens of corporate mortgages to judgments for torts committed by the corporation, and the U. S. Supreme Court has recently rendered an opinion in an interesting case involving this question. The case is *Guardian Trust & Deposit Co. v. Fisher*, 26

Sup. Ct. 186, arising under the North Carolina Code. In this case a corporation had contracted with a city to construct waterworks and supply water and had entered into the performance of the contract. By its failure to keep a sufficient supply of water on hand, fire destroyed buildings belonging to individuals who recovered judgment in the state courts against the corporation "for injury done by the negligence of the defendant."

The main question presented was whether such judgments should take precedence as judgments for torts over corporate mortgages. It was argued that independently of the contract there was no duty upon the water company to furnish an adequate supply of water, that inasmuch as a city owes no such duty to its citizens, the contract of the city with a water company imposes upon such company no higher duty than the city itself owes and that for failure of the company to fulfill its contract, the remedy is for breach of contract alone.

The court, assuming without deciding that the nature of the causes of action upon which the state judgments were rendered was open for consideration in the Federal court, applies the underlying principle as stated in the Massachusetts case above referred to, and holds that the water company by its contract with the city, invites the citizens to avail themselves of its conveniences and to omit making other arrangements for a supply of water, and thereby assumes an absolute duty in that regard for breach of which it is liable to individuals in tort. The opinions of the court delivered by Mr. Justice Brewer is well calculated to relieve any obscurity and doubt which may have heretofore existed as to when an action for tort will arise out of contract and this decision will be especially valuable in the determination of cases of this nature, bound to arise under statutes similar to the one of North Carolina which it seems to be the present tendency to enact.

LIMITATION ON EXEMPTION OF A STATE FROM TAXATION IMPOSED
BY NATIONAL GOVERNMENT.

In *South Carolina v. U. S.*, 26 Sup. Ct. Rep. 110, an exceedingly important limitation was imposed on the familiar principle of constitutional law laid down in *M'Culloch v. Maryland*, 4 Wheat. 316 and *The Collector v. Day*, 11 Wall. 113, which exempts the agents and instrumentalities of either government from taxation by the other on the ground that the power to tax is the power to destroy.

The occasion of the present decision was the refusal of the state of South Carolina to pay the federal excise tax on intoxicating

liquors in the state by its dispensary system. The state claimed that the dispensary system was an instrumentality of the state and was therefore exempt from national taxation. The court did not sustain the contention of the state and drew a clear line of distinction between those state agencies which are subject to federal taxation and those which are exempt, holding that the exemption extends only to those agencies which are of a strictly governmental character and not to those which are used by the state to carry on ordinary private business.

The court view with alarm the strong tendency in the country in favor of the acquisition and management by the public of "public utilities." Suppose the states should adopt the extreme views of some advocates and, by virtue of the police power, assume control over all those matters subject to internal revenue taxes and also go into the business of improving foreign goods, they could seriously impair the efficiency of the national government, if the principle of exemption is as sweeping as South Carolina claims it is.

When the framers of the federal government gave that government complete power over license taxes they never thought that the states had the power to destroy it by extending their functions. It is apparent that some check to this dangerous tendency should be established to protect the federal government. To supply this need the Supreme Court lays down the above principle.

Three of the justices dissented on the ground that, by this ruling "the distinct powers belonging to both national and state governments are reciprocally placed the one at the mercy of the other, so as to give to each the potency of destroying the other." Justice White, in his opinion, points out the absolute power which the states have over the sale of liquors, even to prevent the same altogether under the police power. The exercise of the police power is a governmental function. Therefore when the state takes the sale of liquor into its own hands which it has a right to do by virtue of the police power, the business should be exempt from taxation. Otherwise the national government by its power to tax may destroy the police power of the state.

It would seem that the argument of the court is self-contradictory. It is held that the state has no right indirectly to deprive the federal government of revenue by assuming control over the sale of liquor. Yet the same result may be accomplished directly if the state absolutely prohibits the sale of liquor. In other words the state may not do indirectly what it has the lawful power to do directly.