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RECENT DECISIONS

CORPORATIONS—INTERLOCKING DIRECTORATES—RIGHT OF MINORITY STOCKHOLDER TO VOID TRANSACTION.—The defendants were majority stockholders and directors of the Empire Power Corporation, and also majority stockholders and directors of the Long Island Lighting Company. In 1931-1932 the Long Island Company owed an aggregate of \$10,000,000 to banks and was finding it increasingly difficult to borrow further from those sources. It borrowed from the Empire Corporation on an unsecured note payable within one year. Several other loans were subsequently negotiated with the Empire Corporation, all to be paid within a year, and these notes were constantly renewed over a ten year period by Empire so that at the time of the commencement of this action Long Island was indebted to Empire in the sum of \$5,000,000. In 1936, partly through the marketing of a bond issue, the Long Island Company paid off all its unsecured indebtedness, except that owing to Empire. The plaintiff, a minority stockholder of Empire, brought this action to compel the board of directors of that corporation to demand from the Long Island Company the payment of the indebtedness to Empire; or, in the event that collection could not be made, to compel the individual directors of Empire to pay the same. On appeal from a judgment dismissing the complaint *held*, three judges dissenting, the plaintiff was not entitled to relief since he had failed to establish that the defendant directors had acted in disregard of their duty to stockholders. Judgment affirmed. *Everett v. Phillips*, 288 N. Y. 227, 43 N. E. (2d) 18 (1942).

While the court makes no drastic change in the law, and while the case presents largely a question of fact, the points of law involved deserve some statement.

Fundamentally the proposition, which is at the basis of all actions of this sort, is that of the fiduciary relationship which exists between the directors and shareholders of a corporation. Since the directors are the guardians of the assets of a corporation, the law has placed upon them an inescapable duty of safeguarding the interests of all those who have invested in the corporate whole. In reaching decisions in corporate affairs they are not permitted to consider their own personal interests or advantage, as apart from those of the corporation as a whole. Their decisions must be based upon the belief that the interest and welfare of the corporation and the stockholders generally will be promoted.¹

In a situation such as the one at hand, therefore, where the same men hold the positions of directors in two corporations transacting business with each other, the courts have seen fit to scrutinize these transactions with scrupulous care whenever challenged.² The question to be determined is whether the common directors were

also wrongly decided." (316 U. S. —, 62 S. Ct. at 1251.)

The belated addition of the three Justices to the original and sole dissent of Justice (now Chief Justice) Stone in *Minersville School District v. Gobitis*, discloses, in effect, a five-to-four division in the Supreme Court on the issues engendered by the *Gobitis* and *Opelika* cases. See Kennedy, *The Bethlehem Steel Case—A Test of the New Constitutionalism* (1942) 11 *FORDHAM L. REV.* 135, n. 10.

1. *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N. Y. 185, 123 N. E. 148 (1919); *Southern Pacific Co. v. Bogert*, 250 U. S. 483 (1919); *Pepper v. Litton*, 308 U. S. 295 (1939); *Hyams v. Calumet & Hecla Mining Co.*, 221 Fed. 529 (C. C. A. 6th, 1915).

2. *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590 (1921); *Pepper v. Litton*, 308 U. S. 295 (1939).

fulfilling their fiduciary duties to both corporations when they passed upon the transactions, or whether they were sacrificing the welfare of one corporation for the benefit of the other. The courts do not assume that the situation renders it impossible for the directors to be loyal to both interests. Such transactions are generally not held to be void *per se*.³ The modern structure of business might be greatly impaired if such were the law, and if corporations which happened to have one or many directors in common could not make valid contracts between their corporations.⁴ It is the rule of the New York courts that a transaction involving interlocking directorates is voidable at the option of either of the two corporations involved—regardless of the fairness of the transaction or the balance of benefits.⁵

In the principal case the plaintiff did not attempt to invoke this ruling. It would not have been sufficient to show merely the existence of the interlocking directorates, for this was a stockholder's derivative suit. The law permits either corporation to avoid the transaction if it so desires, but even though a stockholder sues in the name and right of a corporation in which he holds stock, nevertheless, a minority stockholder has no right to seek avoidance of a merely voidable contract without proving a breach of trust by the directors. Any attempt to avoid under these rulings would have to be made by the majority of the stockholders.⁶

The rule of law on which the plaintiff stockholder did rely in this action is usually stated thus: Any transaction between two corporations having common directors is voidable by a stockholder in a court of equity if it appears that the directors of his corporation have acted in bad faith, fraudulently, or have otherwise breached the duty owed to shareholders.⁷ It is not sufficient that the directors made a mere

3. *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17 (1899); *Continental Ins. Co. v. N. Y. & H. R. Co.*, 187 N. Y. 225, 79 N. E. 1026 (1907); *Spiegel v. Beacon Participations, Inc.*, 297 Mass. 398, 8 N. E. (2d) 895 (1937); *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587 (1875). Some courts, however, consider the transaction absolutely void on the theory that a director cannot serve two masters. *Aberdeen R.R. Co. v. Blaikie*, 1 Macqueen's Scot. App. Cas. (H. L.) 461 (1854); *Peerless Fire Ins. Co. v. Reveire*, 188 S. W. 254 (Tex. Civ. App. 1916).

4. STEVENS, *PRIVATE CORPORATIONS* (1936) 578.

5. *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 224 N. Y. 483, 121 N. E. 378 (1918); *Munson v. Syracuse G. & C. R. Co.*, 103 N. Y. 58, 8 N. E. 355 (1886). For collection of all major New York cases concerning attempts to avoid transactions involving interlocking directorates see 114 A. L. R. (1938) 301.

6. *Wallace v. L. I. R. R.*, 12 Hun 460 (N. Y. 1877); *Corsicana National Bank v. Johnson*, 251 U. S. 68, 90 (1919); *Shaw v. Davis*, 78 Md. 308, 28 Atl. 618 (1894). In *Pollitz v. Wabash R.R. Co.*, 207 N. Y. 113, 127, 100 N. E. 721, 725 (1912) it is said: "The transaction approved and confirmed by the majority of the stockholders, as the defenses allege, was not fraudulent. It was irregular and unlawful because the Wabash Co. and the syndicate had members in common. But being *intra vires* and fair, candid and reasonable, under the allegations of the defenses, it was voidable, not void, and was subject to repudiation or ratification by a duly had vote of the majority of the stockholders."

7. *Sage v. Culver*, 147 N. Y. 241, 41 N. E. 513 (1895); *Koral v. Savory Inc.*, 276 N. Y. 215, 11 N. E. (2d) 883 (1937); *Farmers' Loan & T. Co. v. N. Y. & Northern Ry.*, 150 N. Y. 410, 44 N. E. 1043 (1896); *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261, 264 (1917); *Kavanaugh v. Kavanaugh Knitting Co.*, 226 N. Y. 185, 123 N. E. 148 (1919).

mistake in judgment.⁸ Nor is it necessary that loss be sustained by the stockholder's corporation.⁹ But if the duty which the directors or fiduciaries owe to the stockholders be breached, the court will sustain the stockholder's plea.

Usually in actions involving interlocking directorates the very existence of business dealings between the two corporations raises a presumption of bad faith on the part of the defendant directors, which presumption must be rebutted by the defendants.¹⁰ It is then up to the directors to go forward with evidence that the transaction was carried out in good faith and with regard to their fiduciary duty.

But in the instant case there was a factor which the court considered cogent enough to change the situation. The certificate of incorporation of Empire contained a provision that "No contract or other transaction between the Corporation and any other corporation shall be affected or invalidated by the fact that any one or more of the directors of this Corporation is or are interested in, or is a director or officer, or are directors or officers, of such other corporation, . . . and no contract, act or transaction of this Corporation with any person or persons, firm or corporation, shall be affected or invalidated by the fact that any director or directors of this Corporation is a party, or are parties to or interested in such contract, act or transaction, or in any way connected with such person or persons, firm or association, . . ."¹¹ This provision was held by the court to exonerate the directors at least in part from any adverse inferences which might be drawn against them.¹² The inference of bad faith having thus been neutralized, the burden rested upon the plaintiff, unaided by the presumption, to show a breach of trust. The court's action seems to be quite sound in this respect. It is not to be supposed that the certificate thus phrased gives the directors a license to breach their duty. But the certificate of incorporation is, as between the corporation and its stockholders and as among the stockholders, a contract,¹³ and every stockholder is presumed to be cognizant of its provisions.¹⁴ Since subscribers are bound by such provisions as are lawfully included in the certificate,¹⁵ they are deemed to have given implied consent to intercorporate transactions carried on in the interest of their corporation.

8. Matter of Clark, 257 N. Y. 132, 177 N. E. 397 (1931).

9. In Murray v. Smith, 166 App. Div. 528, 152 N. Y. Supp. 102 (2d Dep't 1915); it was held that a stockholder, suing the president and directors of a corporation to require restoration of corporate funds illegally loaned, had a right to insist that the illegal act be undone, though there was no proof of loss to the corporation.

10. Sage v. Culver, 147 N. Y. 241, 41 N. E. 513 (1895); Pepper v. Litton, 308 U. S. 295 (1939); Hyams v. Calumet & Hecla Mining Co., 221 Fed. 529 (1915); Garret v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 P. 1044 (1928). But see Frank H. Buck Co. v. Tuxedo Land Co., 109 Cal. App. 453, 293 P. 122 (1930), holding that the burden of proof remains with the plaintiff minority stockholder.

11. Everett v. Phillips, 288 N. Y. 227, 233, 43 N. E. (2d) 18, 20 (1942).

12. The dissenting opinion gave no consideration to this effect of the certificate of incorporation. Apparently there is no direct New York precedent for this holding of the majority. The court cites Spiegel v. Beacon Participations, Inc., 297 Mass. 398, 417, 8 N. E. (2d) 895, 907 (1937).

13. Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 77 N. E. 13 (1906); Kent v. Quick-silver Mining Co., 78 N. Y. 159, 180 (1879).

14. Savings Ass'n of St. Louis v. O'Brien, 51 Hun 45, 3 N. Y. Supp. 764 (1889).

15. People *ex rel.* Barney v. Whalen, 119 App. Div. 749, 104 N. Y. Supp. 555 (3d Dep't 1907), *aff'd mem.* 189 N. Y. 560, 82 N. E. 1131 (1907).

Deprived of the advantage of the presumption of bad faith, usually raised in a case of this kind, the plaintiff stockholder was in the position of the ordinary suitor. The case is thus reduced to a question of conflicting inferences and the three-judge dissent attests to the closeness of the choice. The simple question was whether the plaintiff sustained the burden of proof. There may be some who argue that the court failed to sense the true situation when it declined to rule in his favor. But, on the other hand, one would hesitate to assert that the plaintiff had shown the existence of any such unlawful situation by a preponderance of the evidence.

FALSE IMPRISONMENT—MASTER AND SERVANT—LIABILITY FOR FALSE ARREST.—A clerk at the cigar stand of defendant corporation's drug store, believing plaintiff to have stolen some cigars from the counter, followed him into the street, accused him of the supposed theft and caused a policeman to search him. Plaintiff brings an action for false arrest. On appeal from a judgment dismissing the complaint *held*, two judges dissenting, the arrest was not within the scope of the clerk's employment, for if his suspicion had been well founded the cigars would have already passed out of his control, and hence the act was not done to preserve or protect his master's property. Judgment affirmed. *Hammond v. Eckerd's of Asheville, Inc.*, 220 N. C. 596, 18 S. E. (2d) 151 (1942).

It is well established today that a master will be liable for injuries caused by the tortious conduct of his servant while acting within the scope of his employment, even though, through lack of judgment or infirmity of temper, the servant goes beyond his strict line of duty.¹ The rule is based on the social policy that the risk of tortious acts incident to the business should be borne by him for whose benefit the business is being carried on and on the superior ability of such person to administer the risk.² While formerly it was thought that this doctrine of *respondeat superior* did not apply to wilful or malicious acts,³ it is now recognized that a master

1. *Rounds v. Delaware, L. & W. R. R.*, 64 N. Y. 129 (1876); *Mott v. Consumers' Ice Co.*, 73 N. Y. 543 (1878); *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193 (1893). Prior to the end of the 17th Century a master was only liable for those acts of his servant which were expressly authorized or ratified. *Turbeville v. Stampe*, 1 Ld. Raym. 264, 91 Eng. Rep. R. 1072 (1697) is sometimes said to be the "grandfather" of the basic master-servant rule. See Wigmore, *Responsibility for Tortious Acts; Its History* (1894) 7 HARV. L. REV. 315, 383, 392-404; Miller, *The Master-Servant Concept and Judge-Made Law* (1941) 1 LOYOLA L. REV. 25, 28 n. 1.

2. *Hall v. Smith*, 2 Bing. 156, 130 Eng. Rep. R. 265 (1824); *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49 (Mass. 1842). See HARPER, TORTS (1933) 644; RESTATEMENT, AGENCY (1932) § 228, comment b, and articles cited *supra* note 1. Where the master is a store-owner there seems to be a tendency to base the master's liability on the theory that he owes a duty to those with whom he does business through his servant to see that no harm befalls them. See *Efroymson v. Smith*, 29 Ind. App. 451, 63 N. E. 328 (1902); *Stone v. Eisen*, 219 N. Y. 205, 114 N. E. 44 (1916).

3. *McManus v. Crickett*, 1 East. 106, 102 Eng. Rep. R. 43 (1800); *Wright v. Wilcox*, 19 Wend. 343 (N. Y. 1838); *Andrus v. Howard*, 36 Vt. 248 (1863). Part of the difficulty encountered was owing to a confusion of scope of authority with scope of employment. See *Stockwell v. Morris*, 46 Wyo. 1, 22 P. (2d) 189, 190 (1933) pointing out differences between the two concepts.

may be liable for assault,⁴ defamation⁵ and malicious prosecution⁶ as well as for merely negligent wrongs, even though such acts were specifically forbidden.⁷ Although at one time the courts were quick to nonsuit the plaintiff,⁸ the more modern cases require submission of the question of whether the act was within the scope of employment to the jury.⁹

By the overwhelming weight of authority, a servant entrusted with custody of his master's property may do everything necessary to preserve, protect or recover it, and should injury befall a third person while the servant is so acting the master will be liable.¹⁰ However, the act of the servant must be motivated by a desire

4. *Osipoff v. City of N. Y.*, 286 N. Y. 422, 36 N. E. (2d) 646 (1941); *Mott v. Consumers' Ice Co.*, 73 N. Y. 543 (1878); *Limpus v. London General Omnibus Co.*, 1 H. & C. 526 (1867).

5. Where the defamation is libel there appears to be little hesitation in holding the master liable. *Fogg v. Boston & L. R. Corp.*, 148 Mass. 513, 20 N. E. 109 (1889); *Peterson v. Western Union Telegraph Co.*, 75 Minn. 368, 77 N. W. 985 (1899); *Citizens Life Assurance Co. v. Brown*, [1904] A. C. 423.

In the case of slander, the better view is that the master may be liable. *Vowles v. Yakish*, 191 Iowa 368, 179 N. W. 117 (1920); *Citizens Gas & Electric Co. v. Black*, 95 Ohio St. 42, 115 N. E. 495 (1916); *Hypes v. Southern Ry.*, 82 S. C. 315, 64 S. E. 395 (1909). A respectable minority, because of the strongly individual nature of the wrong, holds there must be express authority or ratification. *National Life Ins. Co. v. Abernathy*, 206 Ala. 26, 89 So. 725 (1921); *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986 (1897); *Steward Dry Goods Co. v. Heuchtker*, 148 Ky. 228, 146 S. W. 423 (1912).

6. *Conklin v. Consolidated Ry.*, 196 Mass. 302, 82 N. E. 23 (1907); *Staton v. Mason*, 119 App. Div. 437, 104 N. Y. Supp. 155 (2d Dep't 1907); *Dickerson v. Atlantic Ref. Co.*, 201 N. C. 90, 159 S. E. 446 (1931).

7. *Limpus v. London General Omnibus Co.*, 1 H. & C. 526 (1867), (order to drivers not to interfere with vehicles of competing companies was wilfully disobeyed); *Newberry v. Judd*, 259 Ky. 309, 82 S. W. (2d) 359 (1935) (evidence that master had instructed that no employee should make arrest held inadmissible); *Tyson v. Bauland*, 68 App. Div. 310, 74 N. Y. Supp. 59 (2d Dep't 1902) (special patrolman instructed to report all cases of shoplifting before arresting; fact that arrest made without first reporting held not to relieve master of liability). See also RESTATEMENT, AGENCY § 230.

8. *Daniel v. Atlantic Coast Line R.R.*, 136 N. C. 517, 48 S. E. 816 (1904); *Mali v. Lord*, 39 N. Y. 381 (1868); *Mulligan v. N. Y. & Rockaway Beach R.*, 129 N. Y. 506, 29 N. E. 952 (1892).

9. *Osipoff v. City of N. Y.*, 286 N. Y. 422, 36 N. E. (2d) 646 (1941); *McLaughlin v. N. Y. Edison Co.*, 252 N. Y. 202, 169 N. E. 277 (1929); *Newberry v. Judd*, 259 Ky. 309, 82 S. W. (2d) 359 (1935).

10. *Efroymsen v. Smith*, 29 Ind. App. 451, 63 N. E. 328 (1902); *Newberry v. Judd*, 259 Ky. 309, 82 S. W. (2d) 359 (1935); *Knowles v. Bullene*, 71 Mo. App. 341 (1897); *Moseley v. McCrory Co.*, 101 W. Va. 480, 133 S. E. 73 (1926). Some jurisdictions seem to require that the servant's act be a part of the duties assigned. Thus where the employee of a store arrests a customer suspected of theft the master will not be liable if the servant was a sales clerk, although he will be liable where the servant was a private detective, watchman, manager or floorwalker. See *Delaware, L. & W. R.R. v. Pittinger*, 293 Fed. 853 (C. C. A. 3d, 1923); *Dupre v. Childs*, 52 App. Div. 306, 65 N. Y. Supp. 179 (1st Dep't 1900), *aff'd mem.* 169 N. Y. 585, 62 N. E. 1095 (1901); *Duggan v. Baltimore & Ohio Ry.*, 159 Pa. St. 248, 28 Atl. 182 (1893).

to further his master's business;¹¹ at least this must be a part of the motive.¹² Thus if the servant acts purely out of spite,¹³ or to accomplish some personal object¹⁴ or vindicate public justice¹⁵ the act is not within the scope of his employment, even though the occasion for it arises in the course of his master's business. The real intent with which he acts is what counts. Circumstances such as the time and place of the act, or the task being performed, constitute merely evidence of such intent.¹⁶

The principal case in deciding, as a matter of law, that the arrest was not within the scope of employment seems to have given too broad an application to the rule set forth in *Allen v. London & S. W. Ry.*¹⁷ It is true that in the latter case the master was exonerated where the arrest occurred at a time when the supposed theft would have been completely accomplished. The arrest in no way protected or recovered the master's property but only served to punish the suspected thief.¹⁸ Where, however, the servant is in hot pursuit, with the avowed purpose of recovering his master's property, the inference that he was acting pursuant to his duty as a good citizen, rather than in the scope of his employment as a servant, seems unwarranted.¹⁹ Merely crossing the threshold of his master's store did not, *ipso facto*, carry him out of the scope of his employment.²⁰

11. *Poulton v. London & S. W. Ry.*, L. R. 2 Q. B. 534 (1867).

12. *Uptegrove v. Walker*, 222 Mo. App. 758, 7 S. W. (2d) 734 (1928); RESTATEMENT, AGENCY § 236, comment b.

13. RESTATEMENT, AGENCY § 235, comment a, illustration 2.

14. *Mayfield v. St. Louis, I. M. & S. Ry.*, 97 Ark. 24, 133 S. W. 168 (1910) (Station agent procured arrest under false charge of theft in order to prevent elopement of plaintiff); *Conover v. Jafee*, 238 App. Div. 147, 263 N. Y. Supp. 618 (1st Dep't 1933) (salesgirl arrested customer for alleged theft from her own pocketbook); *Anderson v. Metropolitan Life Insurance Co.*, 128 Misc. 144, 218 N. Y. Supp. 494 (Sup. Ct., Kings Co. 1926) (rape by insurance agent). But see: *Stone v. Eisen*, 219 N. Y. 205, 114 N. E. 44 (1916) (master held liable for attack on customer by employee on implied contract theory; see *supra*, note 2).

15. *Pruitt v. Watson*, 103 W. Va. 627, 138 S. E. 331 (1926) (where a servant, having arrested a customer for alleged shoplifting, has recovered the property, the master is not liable for the further detention until the arrival of police); *St. Louis I. M. & S. Ry. v. Sims*, 106 Ark. 109, 152 S. W. 985 (1913) (railroad company not liable where conductor causes arrest of passenger on suspicion of being a murderer). Compare *Mulligan v. N. Y. & Rockaway Beach R.R.*, 129 N. Y. 506, 29 N. E. 952 (1892) with *Palmieri v. Manhattan R.R.*, 133 N. Y. 261, 30 N. E. 1001 (1892). See also RESTATEMENT, AGENCY § 245, comment f.

16. *Morgan v. Loyacombo*, 190 Miss. 656, 1 So. (2d) 510 (1941); RESTATEMENT, AGENCY § 235, comment a.

17. L. R. 6 Q. B. 65 (1870).

18. For other cases holding that a servant has no authority to punish a past aggression as opposed to authority to protect his master's goods against actual attack, see: *Girvin v. New York C. & H. R.R.*, 166 N. Y. 289, 59 N. E. 921 (1901); *Daniel v. Atlantic Coast Line R.R.*, 136 N. C. 517, 48 S. E. 816 (1904).

19. *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193 (1893); *Hammond v. Eckerd's of Asheville Inc.*, 220 N. C. 596, 18 S. E. (2d) 151 (1942) (dissenting opinion).

20. *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 308, 171 So. 214 (1936). See also: *Jacobs v. Third Avenue R.R.*, 71 App. Div. 199, 75 N. Y. Supp. 679 (1st Dep't 1902).

New York appears to be in the anomalous position of generally recognizing the doctrine of *respondeat superior* in arrest cases²¹ and yet holding the master is not liable where the false arrest is by a salesclerk.²² The early case of *Mali v. Lord*²³ which established this holding assigned as its reason that the master himself could not lawfully have made the arrest. The court relied on *Poulton v. London & S. W. Ry.*²⁴ in which case the act for which the plaintiff was arrested (failure to pay freight) would under no circumstance have warranted an arrest, and therefore there could be no duty on the servant to make an arrest. In such a case it may well be that the act is without the scope of the servant's employment.²⁵ In the *Mali* case, however, as in most cases of false arrest, there could be no question of liability if the person arrested were actually the thief. As the clerk owes a duty to protect his master's property, even to the extent of making an arrest, it would seem the preferable view that the master should be liable if the servant, acting pursuant to such duty, mistakenly arrests an innocent person.²⁶ While decisions in other states have been quick to criticize the *Mali* case,²⁷ later New York courts have not seen fit to overrule, but only to distinguish it.²⁸

LANDLORD AND TENANT—IMPOSSIBILITY OF PERFORMANCE—EFFECT OF WAR LEGISLATION.—On December 1, 1937, plaintiff and defendant entered into a written lease of plaintiff's premises for a term of five and a half years. The lease contained the provision that the premises were to be used "only for a showroom for automobiles and automobile accessories". When the defendant tenant failed to pay the December 1941 rent but continued to occupy the premises, the plaintiff brought summary proceedings for the removal of the defendant and payment of the rent in arrears. Before the issuance of the final order defendant surrendered the premises, and interposed as a defense to the claim for rent the fact that the various orders of the Office of Production Management (OPM) had made the sale of new automobiles impossible and that he was therefore released from his obligation to pay rent. The Municipal Court dismissed the petition, holding that the impossibility of using the premises for the contemplated purpose released the defendant from the obligation to pay

21. *Palmieri v. Manhattan R.R.*, 133 N. Y. 261, 30 N. E. 1001 (1892); *Dupre v. Childs*, 52 App. Div. 306, 65 N. Y. Supp. 179 (1st Dep't 1900), *aff'd mem.* 169 N. Y. 585, 62 N. E. 1095 (1901); *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169 (1902).

22. *Mali v. Lord*, 39 N. Y. 381 (1868); *Homeyer v. Yaverbaum*, 197 App. Div. 184, 188 N. Y. Supp. 849 (2d Dep't 1921).

23. 39 N. Y. 381 (1868).

24. L. R. 2 Q. B. 534 (1867).

25. At least this seems to be the rule prevailing in New York. See *Muller v. Hillenbrand*, 227 N. Y. 448, 125 N. E. 808 (1920); *cf. Bram v. Luset Realty Corp.*, 8 N. Y. S. (2d) 176 (City Ct., Bronx Co. 1938).

26. See *Staples v. Schmid*, 18 R. I. 224, 26 Atl. 193 (1893).

27. *Field v. Kane*, 99 Ill. App. 1 (1901); *Knowles v. Bullene*, 71 Mo. App. 341 (1897); *Newberry v. Judd*, 259 Ky. 309, 82 S. W. (2d) 359 (1935).

28. See *supra* note 21. Apparently *Mali v. Lord*, 39 N. Y. 381, is still the law of New York. The latest case exactly in point seems to be *Homeyer v. Yaverbaum*, 197 App. Div. 184, 188 N. Y. Supp. 849 (2d Dep't 1921) in which the former case was cited as controlling.

rent. On appeal to the Appellate Term, *held*, impossibility is no defense to the claim for rent accruing during occupancy of the premises. Judgment reversed. *Colonial Operating Corporation v. Hannon Sales & Service, Inc.*, 178 Misc. 885, 36 N. Y. S. (2d) 745 (App. Term, 2d Dep't 1942), *rev'g* 178 Misc. 879, 34 N. Y. S. (2d) 116 (1942).

This decision finds support in statute and precedents.¹ However, the claim of alleged impossibility of performance as a result of governmental restrictions should be analyzed in view of the dicta contained in both of the above decisions to the effect that the governmental regulations rendered a substantial use of the premises impossible. The appellate court without discussing the question assumed the existence of an impossibility. The lower court placed its decision on the express ground that this is a case where the impossibility of performance is the result of governmental regulations. In support of this view the latter court relied upon the decision of *Mawhinney v. Millbrook Woolen Mills*² where the government took over the whole production of a plant and thus made it a violation of a government order to deliver goods to anybody but the government. It seems doubtful whether this analogy can be upheld in the face of the obvious factual distinction between the *principal* case and the precedent. By applying the rule developed in the *Mawhinney* case the court seemed to consider the *instant* case one of legal impossibility, that is, one where it became impossible (not merely unprofitable) to use the premises for the sale of automobiles. It is submitted that this view cannot be supported by the facts. Under the governmental regulation relied upon as a defense the tenant is not prevented from continuing with the lease; he may sell automobiles if he can find qualified purchasers and may even order new cars.³ But his business has become unprofitable because of governmental restrictions of the sale of new models. The precedents applicable to the principal case should, therefore, not be taken from the cases of legal impossibility, but rather from cases where the continuation of business has become less profitable as the result of restrictive legislation. It would be more correct to draw an analogy with the prohibition cases, as they present a factual situation very similar to the one involved here. In each of those cases, a lessee of a restaurant or saloon claimed that as a result of the prohibition laws he could not maintain his business in the contemplated way and, when sued for rent, alleged that the performance of the contract had thus become impossible. The court held the tenant to the terms of the lease, despite the obvious hardship, because the lessee could continue to sell refreshments and beverages other than intoxicating liquor,⁴

1. The decision of the appellate court is based upon § 1410 *et seq.* of the New York Civil Practice Act and is supported by *Cornwell v. Sanford*, 222 N. Y. 248, 118 N. E. 620 (1918). In summary proceedings, the defenses of the tenant are limited in scope. As long as the tenant retains possession his obligation to pay rent continues and the issue of impossibility of performance may not be raised. See: *KEOGH, LANDLORD AND TENANT AND OTHERS IN SUMMARY PROCEEDINGS* (1932) 255.

2. *Mawhinney v. Millbrook Woolen Mills*, 231 N. Y. 290, 132 N. E. 93 (1921).

3. Rationing Order No. 2A: New Passenger Automobile Regulations. C. F. R. Title 32, Ch. 11, Part 1360. Issued February 21, 1942. Federal Register, February 26, 1942. See in particular Subtitle 1360.372 for classification of persons eligible to purchase new automobiles.

4. *Grace v. Croninger*, 12 Cal. App. (2d) 603, 55 P. (2d) 940 (1936); *Bailey v. Gipstein*, 110 Conn. 680, 149 Atl. 137 (1930); *Kerley v. Mayer*, 10 Misc. 718, *aff'd without*

unless it was expressly written into the contract that laws prohibiting the use of the premises for the sale of liquor would work a termination of the lease⁵ or such an intention was clearly implied.⁶

Measured by the standards developed in those cases the issue always is whether or not the parties had anticipated such contingency and made it part of the contract. The release from the contract is then given, not because of a supervening impossibility, but because of the occurrence of a condition subsequent which was within the contemplation of the parties. Thus it may be said that the trend of the decisions points to the strict enforcement of the contract. The difficulty and expense of performance occasioned by a law enacted after the execution of the contract alone will not excuse performance.⁷ The Restatement seems to support this view.⁸ The English courts, apparently, in a somewhat analogous situation have refused to release a tenant from his lease⁹ unless he comes within the special provisions of the "Landlord and Tenant (War Damage) Act of 1939".¹⁰ In a set of similar facts the

opinion 155 N. Y. 636, 49 N. E. 1099 (1898). See also Thornton, *Effect of Adoption of Prohibition upon Liquor Cases* (1932) 94 CENT. L. J. 40. Also on the subject: WILLISTON, CONTRACTS (rev. ed. 1938) § 1955.

5. Schaub v. Wright, 130 N. E. 143 (Ind. App. 1921); Pabst Brewing Co. v. Howard, 211 S. W. 720 (Mo. App. 1919); Warm Springs Co. v. Salt Lake City, 50 Utah 58, 165 Pac. 788 (1917).

6. Kaiser v. Zeigler, 115 Misc. 281, 187 N. Y. Supp. 638 (1921); Doherty v. Monroe Eckstein Brewing Co., 198 App. Div. 708, 191 N. Y. Supp. 59 (1921); Adler v. Miles, 69 Misc. 601, 126 N. Y. Supp. 135 (1910); Shepard v. Sullivan, 94 Wash. 134, 162 Pac. 34 (1916).

In the "coronation cases", the court reads into the contract involved an implied condition that the sole inducement for entering into the contract will not be frustrated by an intervening circumstance although there is still the possibility of literal performance. Blakely v. Muller, 19 T. L. R. 186 (1903); Clark v. Lindsay, 19 T. L. R. 202 (1903); Krell v. Henry, 2 K. B. 740 (1903). *Accord*: Marks Realty Co. v. Hotel Hermitage Co., 170 App. Div. 484, 156 N. Y. Supp. 179 (1915); Marks Realty Co. v. "Churchills", 90 Misc. 370, 153 N. Y. Supp. 264 (1915). See also 6 WILLISTON, CONTRACTS (rev. ed. 1938) 5477.

7. Town of North Hempstead v. Public Service Corporation of Long Island, 107 Misc. 19 *aff'd* 192 App. Div. 924, 182 N. Y. Supp. 954 (2d Dep't 1920); Raner v. Goldberg, 244 N. Y. 438, 155 N. E. 733 (1927). Cases where failure to obtain a liquor license prevents the use of the premises for the maintenance of a saloon were held not to excuse the tenant from payment of rent are: Burgett v. Loeb, 43 Ind. App. 657, 88 N. E. 346 (1900); Boyle v. Teller, 132 Pa. St. 56, 18 Atl. 1069 (1890); Gaston v. Gordon, 208 Mass. 265, 94 N. E. 307 (1911); Burke v. San Francisco Breweries, 21 Cal. App. 198, 131 Pac. 83 (1913).

8. RESTATEMENT, CONTRACTS §§ 457, 455 and 467.

9. See McELROY, IMPOSSIBILITY OF PERFORMANCE (1941) 107-112. Under the aspect of "frustration of contract" two recent decisions refused to hold that war conditions and increased difficulties alone are not sufficient cause for termination of liability under the contract. Bakubhai & Ambalal v. South Australian Farmers' Co-operative Union of Adelaide, 69 Ll. L. Rep. 138 (1941); Jute and General Products v. Simon & Co., 79 Ll. L. Rep. 79 (1942).

10. 2 & 3 Geo. VI, c. 72.

City Court of New York held for the tenant, however, without giving the problem any detailed consideration.¹¹ As the principal case and the one last mentioned are at present the only expressions on the subject and the higher courts have not yet considered the matter, it may be said that the question is still open in New York.

WILLS—EXECUTION—NECESSITY OF SIGNATURE AT END.—Testatrix wrote a holographic will, concluding with the clause, "In the presence of witnesses", followed by the signatures of two witnesses. One witness was present while the whole of the document was written and the other, during the writing of the latter part only. In the presence of both witnesses the testatrix wrote on an envelope the words, "The last will and testament of Jane Catherine Mann", and placed the will in the envelope and sealed it. Apart from the superscription on the envelope the will was not signed by the testatrix. The contestants challenged the will on the ground that it was not signed at the end by the testatrix as required by law. *Held*, since the circumstances precluded any possibility of fraud, the envelope must be regarded as an attached paper, thus giving effect to the intent of the testatrix, and the documents were admitted to probate. In finding that the signature on the envelope complied with the statutory requirements, the court construed the phrase of the Wills Act Amendment Act, 1852, § 1 ". . . and the enumeration of the above circumstances shall not restrict the generality of the above enactment . . ." to be a provision which "seems plainly to exclude the application of the rule of *ejusdem generis*." *In the Estate of Mann*, 2 P. D. A. 193, All England Law Reports Annotated, July 18, 1942.

The decision seems contrary to the weight of English authority and presents a definite departure from well established rules governing the probate of wills.¹ In effect, the conclusion reached by the decision seems to be that since there was no possibility of fraud, which was the reason for the rule, the rule itself in this particular case could be abrogated to give effect to the intent of the testatrix. The fact that no fraud has been found is, by the weight of authority, no justification for excusing non-compliance with a statute.² It may be that the court's construction of the Wills Act Amendment Act correctly interprets the intent of Parliament in enacting the Amendment. True it is that this Amendment went far in relaxing the strict rules regarding execution of wills. In brief, these enumerated "circumstances" permit the probate of a will which is signed at the end, even though ". . . the signature shall not follow or be immediately after the foot or end of the will or . . . a blank space shall intervene between the concluding word of the will and the signature, . . ." Moreover, the Wills Act Amendment Act permits probate of a will when the signature appears only in the testimonium or attestation clauses, or follows

11. *Signal Land Corporation v. Loecher*, 35 N. Y. S. (2d) 25 (1942).

1. *In re Goods of Evans*, 128 L. T. 669 (1923); *Royle v. Harris*, (1895) P. 163; *In re Goods of Malen*, 54 L. J. 91 (1883); *In re Goods of Gee*, 78 L. T. 843 (1898). But see *In re Goods of Almosnino*, 1 Sw. & Tr. 508, 164 Eng. Rep. R. 834 (1859). 1 PAGE, WILLS, 457, § 275 (2d ed. 1928).

2. *LeMayne v. Stanley*, 3 Lev. 1 (1681); *Younger v. Duffie*, 94 N. Y. 534 (1884). *Matter of Booth*, 127 N. Y. 109, 116, 27 N. E. 826 (1891); *Matter of Seaman*, 146 Cal. 455, 80 Pac. 700 (1905).

after the name or names of the subscribing witnesses, or is on a side or page of the will whereon no disposing part of the will is written, even though there appears to be sufficient space at the bottom of the preceding page.

If, despite the liberality of these detailed circumstances, the courts may construe the general phrase, relied upon by the court, as permitting probate of such a document as in the principal case, of what avail is the Amendment and what does it mean? Of what weight is a prior phrase of the same Amendment "*that it shall be apparent on the face of the will*, that the testator intended to give effect by such his signature to the writing signed as his will"?³ This requirement seems clearly to place a limitation on any such broad construction of the Amendment, and would seem to prohibit probate of the will in question. Such a requirement, if not indicating the application of the rule of *ejusdem generis* or *noscitur a sociis*, clearly provides a safeguard which at least limits, if it does not prohibit, such a liberal construction. Obviously the Amendment must be read and construed as a whole, and on such a reading, there seems little legislative sanction for the construction offered in the principal case. The English courts do not require that all papers of which a will consists be signed by the deceased or connected together, but they probate such papers as one will on the theory of integration, provided there is an internal coherence.⁴ A more recent English case⁵ holds that in order to avoid fraud the several papers forming a will must at the time of execution be attached in some way, though it does not matter if they later become detached.⁶

3. 15 & 16 Vict. c. 24, 1852, Wills Act Amendment Act, § 1. *Royle v. Harris*, [1895] P. 163. (Italics added.)

4. *Gregory v. Queen's Proctor*, 7 L. T. (O. S.) 470 (1846).

5. *Lewis v. Lewis*, [1908] P. 1 (1907).

6. Whether the decision in the principal case might possibly be justified either on the theory of integration or incorporation by implied reference, neither of which is mentioned in the opinion, but both of which are recognized in England, presents an interesting question. Integration is a term used to mean writings which form part of a single written memorial. WIGMORE, EVIDENCE (3d ed. 1940) § 2401. Incorporation by reference is the expression used whereby a testamentary document, if in existence at the time a will is executed and if sufficiently identified in the will may, though neither signed nor attested, be probated as part and parcel of a validly executed will. *Allen v. Maddock*, 11 Moo. P. C. 427, 14 Eng. Rep. R. 757 (1858). The will in *Goods of Almosnino*, 1 Sw. & Tr. 508, 510, 164 Eng. Rep. R. 834 (1859), was admitted to probate on the theory of incorporation by reference. There, the testatrix enclosed a signed but unattested holographic document making a testamentary disposition of her property in a sealed envelope on which she wrote: "I confirm the contents written in the enclosed document." This superscription was duly signed by the testatrix and attested by two witnesses. The court found a valid will and admitted parol evidence to establish the identity of the papers and "all the circumstances of the case". The facts in the *Almosnino* case seem clearly to fall within the definition of integration, rather than within the requirements of incorporation by reference, yet the decision was expressly based on the latter theory. "The divergence of views in the wills cases . . . is largely due to the disinclination of some courts to distinguish between integration and incorporation and so support as an integrated will papers not referred to in such a clear way as to satisfy the court's notion of incorporation by reference. Yet a liberal view would support incorporation by inferential reference." COSTIGAN, CASES ON WILLS (3d ed. 1941) 437, n. 11.

For the New York view on incorporation by reference see *Matter of Fowles*, 222 N. Y.

The right to devise property is wholly a statutory privilege which did not exist at common law.⁷ Traditionally the test of the validity of a will has been: does it comply with statutory requirements?⁸ The difference in the statutes of the various jurisdictions accounts in large part for the divergence in decisions on this subject. While both England and the majority of the States of the Union require that the will be signed at the end, the construction of what is "the end" differs with different jurisdictions. As a general rule the English courts look for the signature of the testator, and construe that to be the end, probating all that precedes it, and refusing probate to any dispositions which follow the signature.⁹ On the other hand, in New York,¹⁰ and in most of the other States of the Union,¹¹ the courts look first for the end of the will, and unless the signature is there, the will is not probated, even though the signature appears elsewhere in the document.

Facts similar to those in the principal case have been before the American courts on several occasions,¹² but in one jurisdiction only, North Carolina, has a case been found where the courts admitted such a will to probate.¹³ The North Carolina statute,¹⁴ like the statutes of Arizona, California and Virginia,¹⁵ requires signing,

222, 118 N. E. 611 (1918); *Matter of Rausch*, 258 N. Y. 327, 179 N. E. 755 (1932); Comment (1941) 10 FORDHAM L. REV. 82; Evans, *Incorporation by Reference, Integration, and Non-Testamentary Act*, (1925) 25 COL. L. REV. 879.

7. *Matter of Delano*, 176 N. Y. 486, 68 N. E. 871 (1903), *aff'd* 205 U. S. 466 (1907); *Peace v. Edwards*, 170 N. C. 64, 86 S. E. 807 (1915); *Lewark v. Dodd*, 288 Ill. 80, 123 N. E. 260 (1919). The first Statute of Wills, 32 Henry VIII c. 1, was enacted in 1540, but not until the passage of the Statute of Frauds, 28 Car. II c. 3, section 5, in 1677, were wills required to be executed in the manner and form we know today.

8. *In re Tyrrel's Estate*, 17 Ariz. 418, 153 Pac. 767 (1915). *Matter of Conway*, 124 N. Y. 455, 26 N. E. 1028 (1891); *Matter of Andrews*, 162 N. Y. 1, 56 N. E. 529 (1900); *Matter of Seaman*, 146 Cal. 455, 80 Pac. 700 (1905); *In re Poland's Estate*, 137 La. 219, 68 So. 415 (1915); *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843 (1890).

9. *In re Goods of Malen*, 54 L. J. 91 (1885). For a more thorough discussion of the English and American construction of the rule regarding signing at the end see (1937) 6 FORDHAM L. REV. 147.

10. *Matter of Conway*, 124 N. Y. 455, 26 N. E. 1028 (1891); *Matter of O'Neill*, 91 N. Y. 516 (1883); *Matter of Andrews*, 162 N. Y. 1, 56 N. E. 529 (1900); *Matter of Field*, 204 N. Y. 448, 97 N. E. 881 (1912).

11. *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843 (1890); *In re Manchester's Estate*. 174 Cal. 417, 163 Pac. 358 (1917). 1 PAGE, WILLS (2d ed. 1928) 468, § 283.

12. *In re Tyrrel's Estate*, 17 Ariz. 418, 153 Pac. 767 (1915); *Warwick v. Warwick*, 86 Va. 596, 10 S. E. 843 (1890); *In re Manchester's Estate*, 174 Cal. 417, 163 Pac. 358 (1917); *Matter of Perrine*, 109 Misc. 459, 180 N. Y. Supp. 333 (1919); *In re Poland's Estate*, 137 La. 219, 68 So. 415 (1915); *Alexander v. Johnson*, 170 N. C. 468, 88 S. E. 785 (1916).

13. *Alexander v. Johnson*, 171 N. C. 468, 88 S. E. 785 (1916). An unsigned holographic document enclosed in a sealed envelope on which was superscribed "Julia W. Johnson's will", was probated as a holographic will as the papers were physically connected by the endorsement, the enclosure, and the sealing of the envelope.

14. NORTH CAROLINA CODE (1935) § 4131.

15. ARIZONA REVISED CODE (1928) § 3637; CALIFORNIA PROBATE CODE (1935) § 53; VIRGINIA CODE ANNOTATED (1930) c. 212, § 5229.