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THE STANDARD OIL CO. v. THE UNITED STATES[1]

This was a bill filed by the United States against the Standard Oil Company of New Jersey, the Standard Oil Company of California, and of seven other States, several other oil companies, several pipe line companies, a tank line company, John D. Rockefeller and six other individuals. It was alleged that Rockefeller and others had as early as 1870, formed a design to become the purchaser, refiner and seller of a large proportion of the petroleum found in the United States,—that corporations had been formed for the carrying on of various operations pertaining to petroleum, that finally, for the Standard Oil Company of New Jersey a comprehensive charter was procured, which allowed it to increase its capital stock and engage in various businesses, and that, in pursuance of this enlarged charter, the stock of each of the various corporations, defendants, or important proportions of it, were sold to the New Jersey corporation, which, in this way, acquired control over the business of the various subsidiary corporations, and a monopoly of the oil trade. The bill prayed that the facts being ascertained, an injunction against the continuance of the combination, and a decree requiring the remission to their former owners of the shares in the subsidiary corporations, by the New Jersey corporation, and the dissolution of that corporation might be granted. The Circuit Court of the United States for the Eastern District of Missouri, in which the bill was filed, entered a decree finding that certain of the defendants had, and certain had not, been guilty of participations in an illegal combination, that in the execution of the combination, the Standard Oil Company of New Jersey had issued stock in excess of $90,000,000, in exchange for the stock or parts of the stock of about 40 other corporations. The court finding that

[1]221 U. S. 1; 173 Federal Reporter, 177.

the stocks thus held were held in virtue of the illegal combination, decreed that the New Jersey company, its directors, officers, be enjoined from voting any of the stock in the subsidiary companies, and from exercising any control or influence over the acts of these companies by virtue of its holding their stock. The subsidiary companies were enjoined from paying any dividends to the New Jersey corporation, and from permitting that company to vote any stock in them or to direct the policy of any of them. The decree expressly allowed the companies to distribute ratably to the shareholders of the New Jersey company, the shares to which they were equitably entitled in the stocks of the subsidiary corporations found to be parties to the combination. Most of the defendants, who were specified, were prohibited, until the discontinuance of the operation of the illegal combination, from engaging or continuing in commerce among the States or in the territories of the United States. The decree was not to take effect until 30 days had elapsed after its entry. The Supreme Court on the appeal reversed so much of the decree below as prevented any of the defendants from continuing in interstate commerce, until the discontinuance of the illegal combination. It also extended the period, 30 days, during which the decree was to be suspended to at least 6 months, probably from the final decree of the Supreme Court. In other respects, the decree of the Circuit Court was affirmed.

In the Supreme Court two questions of jurisdiction first attracted attention. The Waters-Pierce Oil Company was the only one of the defendants which was a resident in the district where the bill was filed. But the 5th section of the act of July 2d, 1890 under which the bill was filed, directs that whenever the court shall think that the ends of justice require that other parties should be brought before it, it may cause them to be summoned, whether they reside in the district in which the court is held, or not, and subpoenas to that end may be served in any district by the marshal thereof. The court having issued the subpoenas and the other defendants having been duly served, the court had jurisdiction over them.

The bill narrated facts some of which occurred as far back as 1870, and prior to the enactment of the act of 1890. The Circuit Court over-ruled exception to so much of the bill as

counted upon these facts, but it gave no weight to the facts except so far as they tended to throw light upon the acts done after the passage of the act of 1890. The Supreme Court found no error in this.

The bill filed alleges a violation of the 1st and 2d sections of the Act of Congress of July 2d, 1890. U. S. Comp. St. 1901, p. 3200. The 1st section reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine, not exceeding $5000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." The 2nd section enacts that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding $5000 or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court." Section 8 of the act explains that "The word 'person' or 'persons' wherever used in this act shall be deemed to include corporations and associations."

The object of the proceeding before the court, was not, the defendants having been found guilty of violating these sections, to impose on them the penalties therein defined, but to compel them to desist from the combination or conspiracy in restraint of trade, in pursuance of section 4 of the act which invests the several Circuit Courts of the United States with "jurisdiction to prevent and restrain violations" of the act, and which makes it the duty of the district attorneys of the United States, in their respective districts under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

It is clear that the question before the court which was asked, under the 4th section, to prevent and restrain and annul certain acts of the defendants, was (a) had these acts been done,

(b) were these acts, found to have been done, a violation of the 1st and 2nd sections.

The words which define the prohibited acts, are, expounds the court, words which had been used with a certain signification in the common and statute law, prior to 1890. The chief justice proceeds to consider these words, guided he says, by the principle that when words used in a statute have, at the time of its enactment, "a well known meaning at common law, or in the law of this country, they are presumed to have been used in that sense, unless the context compels to the contrary." We may remark in passing, that "this country" has been said to have no common law. "It is clear there can be no common law of the United States. The federal government is composed [in 1834] of 24 sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the Constitution or [statute] laws of the Union. The common law could be made a part of our federal system, only by legislative adoption.[2]" But all or most of the 48 States have in fact adopted from the common law, many principles, expressed in words and phrases bearing a more or less constant sense. The members of the two houses of Congress come from these States, and for the most part are lawyers. If, in any enactment, they employ words or phrases which, in the legal usages of the States from which they come, have a particular sense, there is doubtless a certain probability that in this enactment these words or phrases have this sense. Since the interpretation of the act of 1890 is thus made to depend on the sense of the expressions "restraint of trade," contract, combination, etc., in restraint of trade, and monopolize, in the "common law," we might have expected a somewhat extended examination of the senses borne by these locutions. Therein we should be disappointed. The chief justice averts, as soon as possible any such expectation, by telling us that he will, it is true, endeavor to seek their meaning, but that, in doing so, he will not indulge in an elaborate and learned analysis of the English and American

[2]Wheaton v. Peters, 8 Peters, 91. C. J. White refers to the debates that preceded the enactment of 1890, as showing doubt whether there was a common law of the United States in the absence of legislation, and as indicating that this doubt was an influence leading to the legislation.

law. The case was important. None could be more so. The "principle" of interpretation adopted, required the settling of the sense of the terms above mentioned, in the common law, if sense not too variable, there was. But, the justice announces that he will seek the meaning of these terms by a "very brief reference to the elementary and indisputable conceptions of both the English and American law on the subject" prior to 1890.

The question was, what did English and American lawyers, judges, law-makers, mean, when they spoke of restraints of trade and monopolies? What acts had they in imagination, when they used these words? There are two, or possibly only one conception. The chief justice is going to make a very brief reference to it. Of course, one or two conceptions, if reasonably clear, do not need an extended reference. What an "indisputable conception" is, only the psychology of the learned jurist, which has not yet published, will assist us to understand. Is it a conception whose existence, or whose form and content, are indisputable? But, surely what we were needing to know, was, have the phrases in question a reasonably constant and clear signification and if they have, what is it? In order to determine that they have, it would be necessary to take at random, a considerable number of statutes, opinions, law-books, works on history, economics, sociology, etc., where the phrases occur, find out the sense in which each user used them, and, comparing these senses, discover their identity or diversity. The problem is the lexicographer's. We confess to a loss of hope of any success from the refusal to use a method, which, alone, could determine whether "restraint of trade," "monopolize" had a fixed meaning, and what, if they had, that meaning was.

The justice contents himself with the use of one short paragraph upon the expression contract in restraint of trade. He tells us, without citation of instances, that in England, the phrase "came to refer to some voluntary restraint put by contract, by an individual, on his right to carry on his trade or calling." He admits variability of signification, for he concedes that originally "all" such contracts were denounced as illegal, whereas, later it was held that the contract must in order to be invalid, restrain the exercise of one's trade or calling every where within the kingdom. Later, the Chief Justice refers to American usage, as agreeing with the English. According to the former, as well

as the latter, by contract in restraint of trade, was meant a "voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively;"[3] but he adds, seemingly, that by American usage[4] the phrase "in restraint of trade" was extended from contracts to other acts; from "subjective" compulsions to refrain from competition in prosecuting one's former trade, to both contracts and acts which had a monopolistic tendency, especially those which diminished competition, and enhanced prices.

With respect to the term monopoly, the chief justice tells us that the term was originally employed[5] to express a right given by the king to a particular person, to produce, sell, buy, use, any kind of thing to the exclusion of others. The power of the crown to create monopolies in this way was subsequently eliminated, he tells us, from the English constitution,[6] but the word persisted, and came to be applied to other phenomena. The objections to monopoly, as stated by the chief justice, are (1) the fact that the grantee of it had the power (a) to fix, and therefore to fix high, the price and (b) to limit the production, and (2) the probable deterioration of the article on account of the absence of competition. Some or all of these mischiefs can be wrought, otherwise than through a grant from the king, sustained by the law. Food stuffs might be bought up by persons, with a view to selling again, at an enhanced price, to the ultimate buyer, a process which had various names, regrating, engrossing, forestalling[7] and which, intimates the justice, resembling monopoly, in that it enhanced prices, came at times, to be called monopoly.[8]

It does not seem to have been necessary for the decision of the problem before the court, to show that the expression "restraint of trade" came to embrace the same acts which had been designated by the term "monopolize."

[3]Subjectively. All contracts, for those who respect their promises, operate "subjectively." All contracts which the law enforces, operate also objectively. The contract not to carry on a trade or business, operates no more "subjectively" than does any other contract, but the word is imposing.

[4]He however later says that the same usage existed in England.

[5]He quotes from Coke, and from Hawkins.

[6]Monopolies were declared contrary to law and void by statute. 21 Jac., 1, C. 3. 4 Black. Comm., 159.

[7]4 Black. Comm., 158.

[8]An act of the State of Massachusetts, 1778-1779, calling forestalling a monopoly, is referred to.

The chief justice, referring to his review of the common law and the law of this country "as to restraint of trade" says that it results that the statute of 1890 was drawn in the light of the existing practical conception of the *law of restraint of trade*, because it groups as within that class, not only contracts which were in restraint of trade in the *subjective* sense, but all contracts or acts which theoretically[9] were attempts to monopolize, yet which in practice[10] had come to be considered as in restraint of trade in a broad sense."[11]

But, if this is so, the makers of the act of 1890 must have known that when, in the 1st section, they criminalized every combination like trusts, or conspiracy in restraint of trade, they were criminalizing monopolizing. Why then did they make another section in which they condemn monopolizing or attempting to monopolize? If it be said that the second section punishes acts of a single person that monopolize,—thus recognizing the possibility of monopoly without co-operation of two or more, so much of it at least, as penalizes "combining or conspiring" to monopolize, is a mere repetition of what appears in the first section. The sections are brief—are constructed on the same plan; and one immediately follows the other. Had the law-makers thought the phrases in the first section to cover monopolizing, or combining to monopolize, the insertion of the second section would probably have seemed to them unnecessary.

The chief justice reminds us of a change of views as to the injurious results of acts known and condemned formerly as forestalling, regrating and engrossing. Statutes forbidding these acts, were repealed in England before and in 1844 upon "the express ground that the prohibited acts had come to be considered as favorable to the development of, and not in restraint of, trade."

But, are we to infer that this view of the innocuousness of regrating, forestalling, etc., which had clearly shown itself in England in 1844, and which has apparently continued to this day, was the view which the congressional legislators of 1890 entertained? If these processes are not monopolizing what criterion shall we use, for distinguishing them from monopolizings? If they are, must we say that the legislation of 1890 is a retreat

[9]An unmeaning word. Were they attempts to monopolize or not?
[10]Practice? What is that? Is it linguistic usage?
[11]What can this mean but that monopolizing was expressed by the phrase acts "in restraint of trade," as well as by the word monopolizing?

from the position of the English parliament of 1844? The opinion of the chief Justice, which appeals to the history of opinion with respect to trade transactions, leaves us in painful uncertainty concerning the significance to be attached to the English change of view in respect to forestalling.

The chief justice has been endeavoring to illustrate the words "in restraint of trade" and "monopolize." He has shown that the only contract "in restraint of trade" known to the law was a contract by which one bound himself to desist for too long a time, or in too wide a territory, from the prosecution of his trade or business. The contract if enforced would restrain him and to restrain him would be to prevent the advantage to the community from his remaining active, and a competitor with others in the same trade or business. He has also shown that purchases by a middleman of certain staple articles, were for a long time forbidden by statute, because such purchases tended to produce one of the evil effects of a "monopoly" created by the king, but he has also shown that for fifty years, this prohibition has been removed.

The intended decision of the court implies a much wider sense of the phrases in question, than that which is revealed by the history of the legal development thus far vouchsafed by the justice. He remits us to a historical generalization. While the dread of monopoly, in the original sense of that word, he remarks passed out of mind, it [the dread!] "did not serve to assuage the fear[12] as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly. It resulted that treating such acts as we have said as amounting to monopoly,[13] sometimes constitutional restrictions, again legislative enactments or judicial decisions, served to enforce and illustrate the purpose to prevent the occurrence of the evils recognized in the mother country as consequent upon monopoly, by providing against contracts or acts of individuals or combinations of individuals or corporations deemed to be conducive to such results."[14] He says "the trend of legisla-

[12]How truly lamentable that the "dread" did not assuage the "fear!"

[13]A characteristically confused sentence.

[14]These statutes and decisions, though of supreme importance, are not specified. In the margin the justice cites three text-books.

[15]"Trend" came to "adapt." The rhetoric of the opinion is as piquant as its other qualities.

tion and judicial decision came more and more to adapt the recognized restrictions to new manifestations of conduct, or of dealing, which, it was thought, justified the inference of intent to do the wrong which it had been the purpose to prevent from the beginning." This probably means that from the beginning, there was public opposition i. e. of legislature or court, to acts of individuals which tended to lessen competition, and therefore to enhance prices, diminish or deteriorate the supply, not to *all* acts producing *all* such effects, but to all acts which were "unreasonably restrictive of competitive conditions." Sometimes, suggests the justice, it is the character of the act, which marks it as impermissible; sometimes the surrounding circumstances are such as to justify the conclusion that the act was not done for the purpose of reasonably forwarding one's interest and developing one's trade, but with intent to do wrong to the general public,[16] and to limit the right of individuals, thus tending to bring about enhancement of prices. He adds the acts forbidden from time to time, have been such as were at the time thought to justify the inference of wrongful intent.

But what criterion is here, to distinguish the permitted acts from the prohibited? Is any act condemned which lessens competition, to any degree, in the sale of any kind of thing? When does a man intend to forward his own interest, without doing wrong to the public, and when, despite doing wrong to the public? A seeing the public supplied with oil by himself, by B, C, D, E, contrives to unite with B, C, D and E in oil production and sale. He is intending to benefit himself. Is his act permissible, unless it appears that he intended that prices should be any higher, or the quality or the quantity of the oil offered inferior? He may or may not have so intended. Suppose he intends that the firm or corporation or trust, created by the combination shall, being able to do so, sell more cheaply, and a better article, than the other producers, not embraced in the combination, are selling

[16]What instances does the history of trade afford, of men monopolizing or restraining trade, in order to "do wrong to the general public?" How does one man limit the rights of individuals? Rights are created by law, and individuals cannot limit them, however much they may violate them. When A monopolizes he does so not in order to put B out of business, but in order to still further enrich himself by increase of the sales which he can make, if B no longer competes with him in the saturation of the demand. B's expulsion from business, is not sought for its own sake, but as incidental to the increase of the ratio of sales made by one's self.

or will sell, and he thus lessens and finally destroys their business. Has he had a wrongful intent? Is his act in consequence unlawful? His intention has been benevolent towards himself and not malevolent towards the consumers. He has not shrunk from destroying his competitors. Is his act tolerated by the statute of 1890? Nothing in the decision assists us to an opinion on this subject.

A, 65 years of age, who has been conducting a business involving inter-state commerce decides to sell it to X. X will not buy unless A agrees never to carry on the same business within the United States. A will in all probability not be able to conduct the business more than four or five years, on account of his age. In contracting to abstain from business, has he violated the act of 1890? That act declares "every contract * * * in restraint of trade or commerce" illegal and punishes it with fine or imprisonment, or both, and White, C. J., shows that contracts to go out of business imposing a "subjective" compulsion are the type of so-called contracts in restraint of trade. The common law imposed no penalties, other than nullification by the courts. Is it true then that every contract, which the judges used to refuse to enforce, becomes criminal, when it concerns inter-state or inter-national commerce? If only some of such contracts are made criminal, which?

The chief justice apparently concedes that there are contracts or acts which in one sense are in restraint of trade, but which however are not intended to be condemned by the statute. He suggests that at common law, the to-be-tolerated and the not-to-be tolerated acts in restraint of trade, were distinguished by the judges, who by the expression contracts in restraint of trade, meant contracts improperly, unreasonably, impermissibly in restraint of trade. So he says the makers of the act of 1890 intended not that every act or contract in restraint of trade, but only those which were unreasonably, improperly, impermissibly in restraint, should be punishable or preventable. Who is to distinguish the two subclasses of trade-restraining contracts? Of course, the judges. Must they have an objective criterion? Must they be able to distinctly express the note or quality, whose presence or absence indicates whether the act is or is not to be allowed? Nothing manifests that they must or are. He says the courts are to apply the "standard of reason," are to use the

"light of reason." The act prohibited is an "unduly restraining" of trade. The criterion for determining whether any particular act is a condemned restraint of trade, "is the rule of reason guided by the established law, and by the plain duty to enforce the prohibition of the act," etc. We are asking how are we to ascertain the sense of the statute, and we are told we must, in ascertaining its sense, be guided by it! Guided by a plain duty to enforce the act! We feel the duty; we long to discover the sense of the act. How shall we find it? By being guided by the duty to enforce it! What twaddle!

What is this "rule of reason," this "standard of reason?" It was remarked over 60 years ago by Sir William Hamilton, as an objection to using the word reason, as a name for the *locus principiorum* "but this term is so vague and ambiguous that it is almost unfitted to convey any definite meaning."[17] Perhaps this is the reason for C. J. White's employing it. Had it had a definite meaning, the thing represented by it would not have answered the purpose. What the justice really means is, that the act of 1890 has given the judges the power to annul any combination, act, etc., which in any possible sense, restrains trade, or smacks of a monopoly. When they want to annul it, they do so. When they don't want to annul it, they say it is not within the condemnation of the statute.

On page 64, occurs this notable paragraph. "The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the statute, leaves room for but one conclusion which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but, while clearly fixing a standard, that is, by defining the ulterior boundaries, which could not be transgressed with impunity, to leave it to be determined

[17]Lectures Metaphysics, p. 512. Dugald Stewart complained that the word was "far from being precise in its meaning." Bowen's Stewart; Phil. of mind., p. 372. Comp, the Century Dictionary. Brooks Adams, in his Theory of Social Revolutions, p. 121, thus comments on Chief Justice White's opinion, "What the Chief Justice had it at heart to do was to surrender a fundamental principle, and yet to appear to make no surrender at all. Hence he prepared his preliminary and extra-judicial essay on the human reason, of whose precise meaning, I must admit, I still, after many perusals, have grave doubts. I sometimes suspect that the Chief Justice did not wish to be too explicit."

by the light of reason,[18] guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute." A few observations upon this statement may not be unprofitable. The enumerations of the acts condemned by the act of 1890 is said to be a "merely generic enumeration." What other kind of enumeration does a statute contain? Turn to any code, the criminal code of Pennsylvania for instance. "All murder which shall be perpetrated by means of poison, etc., shall be deemed murder of the first degree? "If any person shall fraudulently make, sign, alter * * * * he shall be guilty of a misdemeanor;" Contracts or acts, would be the genus. Contracts or acts in restraint of trade would be one of the two possible species. The difficulty with the act as interpreted by the justice is, that it states too wide a species. The legislative species is judicially divided into two sub-species, but the specific difference is left objectively undefined. The court must *ex post facto* determine whether the particular act or contract or combination, was of the allowable or of the disallowable sub-species. There is an obtrusive obviousness in the observation of the justice, that from the absence of a definition of restraint of trade, it may be inferred that it was intended not to give a definition, precise or not. There is no obviousness at all in the further remarks that the statute, which thus neglects to define, "clearly fixes a standard." The act forbidden must be a restraint of trade, but there are many restraints of trade, and some of them are allowable, while others are not. How forbidding acts in restraints of trade, can be a clear fixing of a standard of distinction between acts in restraint of trade which may and which may not be done only a preternatural acuteness can discover.

It is not of much importance to decide whether the decision reached by the court, accords with that pronounced in United States v. Trans-Missouri Freight Association[19] and that in United States v. Joint Traffic Association[20]. Those who study the opinions of the various courts are more surprised by their harmonies than by their dissonances. White, C. J., however

[18]A repetition of the nonsense we have just commented on.
[19]166 U. S., 290.
[20]171 U. S., 505.

seems to find it incumbent upon him to contend that there is no disagreement between the decision reached by him, and the decisions in these two cases. He did not apparently, understand these cases at the time of their publication, as he does now. In the earlier case he filed a long careful and able opinion in dissent. A contract between competing railroad companies, with respect to the rates that should be charged by them, was declared void by the courts. White, J., dissenting, says, "The theory upon which the contract is held to be illegal is that even though it be reasonable, and hence valid under the general principles of law, it is yet void, because it conflicts with the act of congress already referred to. [the act of 1890]*** As it is conceded that the contract does not unreasonably restrain trade, and that if it does not so unreasonably restrain, it is valid under the general law, the decision substantially is that the act of congress is a departure from the general principles of law, and by its terms, destroys the right of individuals or corporations to enter into very many reasonable contracts.[21] But, this proposition, I submit, is tantamount to an assertion that the act of Congress is itself unreasonable." The doctrine to which he commits the court in the case we are considering, is the doctrine which he finds rejected in 166 U. S., 290.[22] It is proper to add that White, C. J., subjoins to his attempt to show the harmony between the cases, the remark that the earlier cases, if in conflict with the Standard Oil case, "are necessarily now limited and qualified."

The defendants contended that, even if there was a monopolization, it was of oil, and took place within the limits of some State, and that, although the oil, when procured by the various refineries, was intended to be shipped into and sold in other States and territories, so that a monopoly of the oil has as one result, a monopoly of the transportation and inter-state commerce in it. Congress had no power to prevent the monopolization of the oil. A similar question appeared in United States v. Knight Co.[23] Of four sugar refining companies, corporations of New

[21]How often have courts proclaimed that an act is valid and reasonable although it prohibits a class of acts, e. g., selling leomargarine, some of which, e.g., the sale of wholesome oleomargarine, are innocent and but for the prohibition praiseworthy?

[22]No wonder that after reading what White, C. J., says, Harlan, J. says he was as much surprised as he would have been with the assertion that black was white. U. S. v. American Tobacco Co., 221 U. S., 191.

[23]156 U. S., 1.

York, New Jersey and Pennsylvania, one, the American Sugar Refining Co., undertook to purchase the stock, machinery and real estate of the other three, in order to control their operations for the purpose of restraining the trade thereof with other States. The bill filed, asked for an injunction against the completion of the plan. The bill was dismissed. "The fact" says Fuller, C. J., that an article is manufactured for export to another State does not make it an article of inter-state trade or commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce." This case is brushed aside with notable insouciance in the case before us.

Another of the contentions of the defendants was that the statute of 1890 cannot be applied to the defendants without impairing rights of property and destroying the freedom of contract or trade, depriving them of liberty and property without due process of law. The answer made to this is, that the statute being interpreted, by the aid of the light of reason, the enforcement of it could not impair the right of persons reasonably to contract, and to use property. The foundation of "these arguments" says the Chief Justice, is "the assumption that reason may not be resorted to, in interpreting and applying the statute, and therefore that the statute unreasonably restricts the right to contract and unreasonably operates upon the right to acquire and hold property." But, since reason may be resorted to, in applying the statute, so as to make it not unreasonably restrictive of the right to contract, and own, the objection vanishes.

The objection is urged that the statute being so general, it cannot be enforced by the courts without a judicial assertion of legislative power. This, thinks the Chief Justice, is "clearly unsound." The statute forbids contracts, combinations, in restraint of trade; that is, a genus of acts. When particular acts are charged to be within this genus, the courts must decide whether such acts being proved, they are or are not within the genus. To deny to the courts this power, would be to "challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning." He proceeds to "demonstrate that which needs no demonstration." How? By a "few obvious examples." What are these examples? "Take for instance," he observes, "the familiar cases where the judi-

ciary is called upon to determine whether a particular act or acts are within a given prohibition, depending on wrongful intent." But, we were going to have a demonstration by examples. Instead of giving examples, the Justice gives us again a vaguely characterized class. Does he mean that statutes prohibiting certain outward acts without respect to intent are held by courts not to prohibit these acts, unless they spring from a certain intent? It would be interesting to know what decisions are supposed by the Chief Justice to be of this sort. Has he in mind, any cases in which the judge selects from all possible intents some, and determines, that only when the acts defined by the legislature spring from one or other of this selected sub-class of intents shall they be deemed prohibited? How edifying it would have been to have an example, a little more "obvious." "Take," again, says the writer of the opinion, "questions of fraud." But, what of them? Why are not the "examples" given? Consider, again, says the writer, what the courts do in every case, when they determine "whether particular acts are invalid, which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon inter-state commerce." This we are to take as an "obvious example" of what courts have been doing "from the beginning" [of what?] What is this last example? The same acts are permissible or not, according to their effects and courts have said so. But, what we are in quest of, are cases in which, when the legislature has condemned certain acts, which previously had not been condemned, the courts have taken upon themselves to divide the legislative class into two sub-classes, those producing and those not producing "direct effects," and have enforced the condemnation as to the first sub-class, and refused to enforce it, as to the second. If the Chief Justice had cases of this sort in mind, they were the very cases which it behooved him to describe with sufficient accuracy.

The Chief Justice fails fairly to state the objection of counsel. It was not, that when the legislature forbids and penalizes a class of acts, robbery, arson, forgery, murder, it is not competent for the court to say that the particular acts proved against the defendant, are or are not acts of the class. To make such a suggestion would be preposterous. What counsel contended was

that when the legislature forbade a class of acts, the courts could not subdivide it, and impose the penalty only on acts within one of the court-made subdivisions. The power of classification is with the legislature, and no classification made by it, can be reformed by the courts, as if they had a revisory power over legislation; as if, in short, they were an appellate legislative body. Why instead of giving us "obvious examples" that are not obvious, did not the Justice address himself to the removal of this really serious difficulty?

The 2d section of the decree of the Circuit Court names John D. Rockefeller, William Rockefeller and five other individuals, several pipe line companies and several oil companies. The 6th section of the decree enjoins these defendants from continuing and carrying into further effect the combination adjudged illegal in the earlier sections, and from entering into or performing any like combination, the effect of which is or *will be* to restrain commerce in petroleum or its products among the States, or territories, or to *prolong* the unlawful monopoly of such commerce, either (1) by a transfer of stocks, or property of competitive parties, to any one party, to a trustee, etc., or (2) by making any express or implied agreement, one with another, like the one adjudged illegal in the earlier sections relative to the control of said corporations, or the price or terms of purchase or sale, or the rates of transportation of petroleum or its products, "which will have a like effect in restraint of commerce among the States, in the territories and with foreign nations to that of the combination the operation of which is hereby enjoined."

Counsel for the defendants contended that after the dissolution of the Standard Oil Company of New Jersey, by the return to their former owners of shares of stock of the companies, some of which were transportation pipe line companies, the 6th section of the decree would prohibit certain agreements between some of these pipe line companies, which not only might not be objectionable, but might be desirable from the point of view of the public interest. Chief Justice White addresses himself to this contention. He concedes that some of the pipe lines, not competitors because not parallel with each other, might determine, in the public interest, so to combine as to make a continuous line and that such a combination would, being valid, not be within the terms of the decree. He thinks, also, that the Union

Tank Line Company, one of the defendants, the owner practically of all the tank cars in use by the combination, might make agreements for the distribution of these cars among the subsidiary corporations. If it could not, the "most serious detriment to the public interest might result." He construes the 6th section of the decree not as depriving the stockholders or the corporations, after the dissolution of the combination forming the Standard Oil Company of New Jersey, of the power of making "normal and lawful contracts or agreements." Harlan, J., in his dissenting opinion construes this to mean that, although the New Jersey corporation must go out of existence, the subsidiary companies, those whose stock the New Jersey corporation held and voted, "may join in an agreement to restrain commerce among the States, if such restraint be not 'undue.'" We think it rather means, that not all combinations, but only combinations in restraint of trade, are forbidden by the act of 1890, and that the supposititious combinations might not restrain trade at all. There can be no doubt however, that it is the purpose of the decision to establish the doctrine that even if a combination restrained trade, it would not violate the act of 1890, unless it did so unduly.

The style of the opinion is as extraordinary as its logic. Note the statement that the parties to the suit, disagreeing with respect to everything else, but agreeing that the decision of the cause must turn on the meaning of the 1st and 2d section of the act of 1890,—"We shall therefore—departing from what otherwise would be the natural order of analysis—make this one point of harmony, the initial basis of our examination of the contentions, relying upon the conception that by doing so some harmonious resonance[24] may result, adequate to dominate and control the discord with which the case abounds."

To discover and state the truth concerning the facts, the arguments of both parties, says the writer, "call for the analysis and weighing as we have said at the outset, of a jungle[25] of conflicting testimony covering a period of 40 years—a duty difficult to perform and, even if satisfactorily accomplished, almost impossible to state [what? the duty?] with any reasonable regard

[24]Consult the Century Dictionary before undertaking to appreciate this fine expression.

[25]To appreciate weighing a jungle, consult the Century Dictionary.

to brevity." At another place, we are told "and by operation of the mental process[26] which led to considering as a monopoly" acts which were thought to produce some of the baleful effects of monopoly "so also[27] because of the impediment or burden to (!) the due course of trade which they produced such acts came to be referred to as in restraint of trade." Speaking of the words "to monopolize," the writer makes the deep remark that "the ambiguity, if any, is involved in determining what is intended by monopolize." Ambiguity involved in determining! Ambiguities are usually in words. Determining what is meant by a word, is usually the elimination of ambiguity.

One of the many remarkable congeries of words found in the opinion is the following: By the comprehensiveness of its language in the 1st and 2d section, it is certain that the purpose of the act was to prevent undue restraints [restraints, not undue restraints are named] of every kind or nature, "nevertheless by the omission of any direct prohibition against monopoly in the concrete,[28] it indicates a consciousness that the freedom of the individual right to contract[29] when not unduly or improperly exercised, [which means possibly, a freedom to make due and proper contracts, but not undue or improper] was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract[30] was the means by which monopoly would be inevitably prevented, if no extraneous or sovereign power imposed it, and no right to make unlawful contracts having a monopolistic tendency were permitted." The 2d section does not use the abstract noun monopoly but it uses the equally abstract verb, monopolize. Is it the congressional preference of verb to noun that reveals this wonderful "consciousness?" What can the writer mean? A monopolizing by one man, interferes with another man's freedom, but is it the other man's freedom that is the means of preventing the monopoly, or is it the prevention of the monopoly that is a means of pre-

[26]The operation of a process is a novelty.

[27]What justifies the use of the word so?

[28]What is that? The 2d section says every person who shall monopolize or attempt or combine with another to monopolize any part of the trade or commerce among the several States, shall be deemed guilty, etc.

[29]Freedom of the right is peculiarly fine.

[30]These forces result from a right!

serving the freedom? Instead of finding the freedom of contract the means of preventing monopoly, is it not too clear for discussion that congress found the penalization of monopolizing, a means of preserving freedom of people, generally, to contract? What are this centrifugal and this centripetal force, that result from the right of free contract? Why must an opinion of the Supreme Court be disfigured with such empty pseudo—scientific jargon?

The opinion of the Justice cannot be defended from the imputation of confusedness of thought. At times, we are led to think that acts in restraint of trade, or of a monopolizing nature, are condemned, not because of their tendency to produce certain deplorable effects, but because of the "intention" to produce such effects. As to the necessaries of life, says the writer, the freedom of the individual to deal [in regrating, forestalling, etc.] was restricted, when the nature and character of the dealing was such as to engender the presumption of *intent* to bring about at least one of the injuries which it was deemed would result from monopoly—that is, an undue enhancement of price. But was the intent material? If the act was done, and it was such as probably to bring about the undue enhancement of price, did it really matter what the "intent" was? Again, says the writer, the "trend" of legislation and decision came more and more to adapt the recognized restrictions to new manifestations of conduct or of dealing, which it was thought, justified the inference of intent to do the wrong, which it had been the purpose to prevent from the beginning." But if conduct does the "wrong," does the court's, the legislature's prohibition of it wait, until the intent to do it is discovered? There is a "wrong" in the objective act, consisting of its perceivable and perceived tendency to produce an undesirable, social and economic effect. Whether the intent to produce that effect exists or not, is immaterial. It would be conclusively "inferred" or presumed, and to say that, is to say that it is immaterial.[31] At another place, the writer says that the fluctuation from time to time in economic conceptions, has been reflected in legislation and decision. Contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent, which were at another period thought not to be of that character." But, the character of the

[31] 4 Wigmore Evid., p. 3535.

act remained the same. Buying corn, etc., before it reaches the market, with a view to the buyer's selling it to others, continued the same from decade to decade. The opinion of the ultimate effect of the process, upon the public welfare, differed from time to time. At one period, one effect only and that a deprecable one was noted. At another time, other and beneficial effects were seen, and were supposed to make amends for the disadvantages. In no stage of the violation, was the "wrongful intent" important. The regrater being sane, he intended, when he bought the corn, to buy it,—he intended also to sell it at a price sufficient to compensate him for what he had paid, for the interest thereon, for his time and his risk. The effect of his acts with those intents, was believed to be to enhance to the consumers, the cost of corn.

The opinion covers 50 pages. How much clearer, how much more worthy of a place in the records of the Supreme Court, might it have been, had it been restricted to 15 pages. Then how much obscure and irrelevant rhetoric, how much strained and unintelligible philosophizing, might have been averted. How much higher might have stood, in the judgment of his contemporaries and of the next generation the name of the writer! With what poignant regret must we note the decline of those powers of thought and exposition which did such honor to him, in his noble dissenting opinion, in the Income Tax case of 1895!

MOOT COURT

HOPPER v. THATCHER

Power of Habitual Drunkard Committee—Authority to Consent to Transfer of Land

STATEMENT OF FACTS

Land was conveyed to Hopper, in trust for John Tumulty for life, remainder to his children. Hopper had power to convey the land with written consent of Tumulty. Tumulty became an habitual drunkard and a committee was appointed for him by the Common Pleas. This committee in writing consented to the conveyance of the land after authority was given him to do so by the court which had appointed him. Hopper then contracted to convey the land to Thatcher for $10,000. Thatcher declines to accept the deed and pay the money, because as he says, his title will not be good. This is an action for the purchase price.

Evans for the plaintiff.

Davis for the defendant.

OPINION OF COURT

FANSEEN, J. This is an action for purchase money brought by Hopper against Thatcher. Thatcher refused to pay purchase price, claiming that the consent of the committee under authority of Court of Common Pleas was not sufficient to pass a clear title.

The only question in this case is whether or not the consent of Tumulty himself, who has become an habitual drunkard, is necessary, or whether a committee expressly appointed for him can assume his position. In the first place Tumulty was an habitual drunkard, and the law, therefore, establishes his incapacity and incapability to attend to his business affairs. 9 P. & L., 14390.

Tumulty had practically no individual existence; Hopper's brain was substituted for his, and Tumulty's written consent to convey any land would be absolutely void. In any contract it is clearly understood that there must be a meeting of minds. Thus we eliminate Tumulty's power from the case.

The learned counsel for the defense maintains that the committee in this case had no power to authorize a sale of the land; that the trustee not being able to pass any title, the purchaser was not bound by his contract. Then if the trustee could not be legally authorized, in whom did the power of conveying the land rest?

Certainly when Tumulty was no longer mentally and physically capable, he was considered a lunatic, and the act of June 13, 1836, provides in such case that a committee take charge of all his real and personal property. From this we would be led to believe that Tumulty's power to

convey was entirely taken away, and vested in the committee, who was appointed to take care of his interests.

Again the learned counsel for the defense claims that the court had no right to authorize the sale of the drunkard's land unless it appear affirmatively that sale was for benefit of drunkard. From the statement of facts, the act of June 3, 1836, has no applicability to present case in this respect.

Let us consider Judge Agnew's opinion in Kennedy v. Johnson, 65 Pa. 451, which is substantially as follows: In view of the doctrine of election as administered in equity, and of the powers conferred on the committee of a lunatic, which are entirely statutary, Hopper had no power without application to the court. In this State, the 5th article of the constitution 6, confers on the court of Common Pleas the power of a court of chancery, so far as relates to the persons and estates of those who are non-compos mentis. The act of June 13, 1836, relating to lunatics and habitual drunkards was passed to carry out this provision of the constitution, and it is under this act that the committee derives all his powers, and unless the power to elect can be found in the law or be fairly inferred from its general terms, it does not exist. When properly qualified, the law confers on the committee the management of the real and personal estate of the lunatic.

Thus the court believes it is obvious that the court of Common Pleas was legally authorized and able to empower the committee to make a conveyance of the land and pass a clear title to defendant. Judgment for plaintiff.

OPINION OF SUPERIOR COURT

The question presented is whether John Tumulty's committee could, under the decree of the court of Common Pleas, give consent to the sale of the land held in trust for Tumulty with the same effect as if it had been given personally by Tumulty when not under guardianship.

The extent of the power of the Common Pleas Court under the constitution and statutes of Pennsylvania is stated in Kennedy v. Johnson, 65 Pa., 451, as follows: "The fifth article of the constitution confers on the Court of Common Pleas the power of a court of chancery so far as relates to the persons and estates of those who are non-compos mentis. The act of June 13th, 1836, relating to lunatics and habitual drunkards was passed to carry out this provision of the constitution." And in McGinnis v. Com., 74 Pa., 245, it is said, "under our statutes, an habitual drunkard is classed with a lunatic, and all such are special subjects in relation to whom the Courts of Common Pleas are expressly invested with the jurisdiction and powers of a court of chancery."

The question presented is, therefore, can the court having jurisdiction of the person and estate of a drunkard cestui, and posssesing full chancery powers, authorize the drunkard's committee to consent to a conveyance by the trustee who is authorized by the trust instrument to convey only with the cestui's consent?

We decide the question in the affirmative. The policy of the law does not favor inalienable interests in land; and the existence of such a power in the court is indispensable for the protection and conservation of the drunkard's interest.

If the title to the land in question had been vested in Tumulty instead of in the trustee, it could not be doubted that after he was adjudged incompetent, the court might authorize his committee to convey his estate. The right to convey in such a case would be as personal to Tumulty as is the right to consent to a conveyance in the present case and we are unable to perceive any reason why a court cannot authorize the committee to consent in the present case which would not be equally applicable to the other. "If it is competent for the court to authorize a sale when the title is in him why may it not authorize his committee to consent to a sale for him, if consent is a necessary prerequisite, when the title is in a trustee for his benefit. We perceive no valid distinction. In each case it is in reality the court acting for the ward, doing what he can no longer do, consenting when he can no longer consent." Trust Co. v. Allison, 108 Me., 326, 80 Atl., 833.

Kennedy v. Johnson, 65 Pa., 451, is a case which in principle is closely analogous to the present case. In this case it was held that the right to elect between a testamentary provision and dower is personal to the widow, nevertheless, where the widow is a lunatic, the Court of Common Pleas will elect in her behalf.

The Supreme Court of Maine, in a recent case, construing the constitution and statutes of Pennsylvania, held that a Court of Common Pleas of Pennsylvania, may authorize a habitual drunkard's committee to consent to a conveyance of real estate which had been placed in trust for a ward prior to his becoming incompetent, with authority in the trustee to convey it with the consent of the beneficiary. Trust Co. v. Allison, 108 Me., 326, 80 Atl., 833.

Affirmed.

COMMONWEALTH v. HERRON

Murder—Flight of Accused as Presumption of Guilt

STATEMENT OF FACTS

Herron was tried for murder. The evidence showed that the day following the murder and a half hour after he learned that he was suspected, he bought a ticket for a point 300 miles away and upon arriving there called himself by a new name, and informed all inquiries that he had come there from California. The trial judge charged the jury that if they believed he had so fled and changed his name, and given at his new home a false account of his former home, they might presume that he was guilty. Verdict of guilty.

Potter for plaintiff.

Morosini for defendant.

OPINION OF THE COURT

BURNS, J. This is a motion for a new trial. Counsel for defense rests on the ground that the trial judge erred in his instruction to the jury and that flight is not sufficient "evidence" to raise a presumption of guilt. In 12 Cyc. 395, it says "that the flight or concealment of the accused raises no presumption of law that he is guilty, but it is a fact which may be considered by the jury.

Dr. Trickett, in his work on Criminal Law of Pennsylvania, says, "that if flight is relied on by the Commonwealth as indicative of a sense of guilt, the defendant may show that it ought to receive a different interpretation, i. e., he fled though innocent because he desired to avoid trouble, or that he desired to escape arrest for other offenses which he had previously committed. The old saying "Once a Rogue, always a Rogue, clings to one who has previously committed some offense in the community where he is known and can be taken as good grounds for flight when accused of a crime which he has not committed. And then again where the police dog a prisoner recently liberated, and cast suspicion on him for a crime which is committed, and he is known to have been in the vicinity there is clearly a good reason for flight.

It has been held in Comm. v. McMahon, 145 Pa., 413, that the flight of a person charged with a crime immediately after the commission of an offense, is a circumstance which the jury may always take into consideration; and if the defense of an alibi is false, or, in the language of the court is "manufactured" it should go for nothing and have some weight against the defendant. A case very similar to the one under consideration, is Comm. v. Lanahan, 84 Pa., 80, in which it was held, that after the shooting, Lanahan's running to his home, his concealment in the woods, his final flight, assumed name and denial of identity was evidence of guilt.

This appears to us a correct view of the case, and of the law; and the verdict must, therefore, be set aside, and a new trial granted.

OPINION OF SUPERIOR COURT

The flight of one toward whom suspicion of having committed a crime is directed may be prompted by various motives. Consciousness of guilt and fear of deserved punishment are by no means the only motives which will induce one to seek refuge in flight. One who is innocent may be emphatically desirous of evading trial because he believes that the coincidence of inculpatory circumstances is such as may bring about his conviction, or because he fears that excited public sentiment or unfounded popular prejudice will preclude a fair trial, or because he wishes to avoid the humiliation and odium attendant upon arrest and trial, or because he does not wish to be put to the expense and annoyance of defending himself.

An appreciation of this fact has led the courts to refuse in some cases to declare that flight raises a presumption of guilt. The courts have been

unwilling to say that from the many possible motives for flight, the law selects consciousness of guilt as the one from which, in absence of evidence to the contrary, it will be presumed the defendant acted. The probability that flight resulted from consciousness of guilt has not been considered sufficiently great to justify the creation of a legal presumption to that effect and the placing upon the defendant the consequent difficult task of rebutting this presumption. 39 L. R. A. & S., 58, 12 Cyc., 395.

The learned court below instructed the jury that they might "presume" that the defendant was guilty. This was not equivalent to saying to the jury that they might "find" the defendant guilty. To presume, is to suppose something to be or to be true, on grounds deemed valid, tho not amounting the proof. Webster's International Dictionary. The instruction was to the effect that there was a legal presumption of guilt; It was equivalent to saying that he might be convicted altho the evidence did not prove that he was guilty. As, according to the great weight of authority, there is no such presumption the instruction was erroneous. See Grant v. C., 71 Pa., 495; C. v. Boschino, 176 Pa., 103.

CREIGH v. BROWN

Negotiability of Bill Lading at Common Law—Under the Act of 1866—Under the Act of 1911

STATEMENT OF FACTS

John Creigh sent $1,000 to his agent with instructions to buy cotton and ship it at once to him. The agent bought the cotton and had it delivered to the X. R. R. Co., taking a bill of lading in which the cotton was consigned to his own order. He then endorsed the bill in blank and attaching it to a draft drawn upon Thompson Brown, discounted the draft at Y Bank. Brown accepted the draft and received the cotton without notice of the agent's wrong. Before he paid the draft the cotton was replevied in his hands by Creigh.

Fine for plaintiff.

Coyne for defendant.

OPINION OF COURT

DAVIS, J. STEWARD, J. This case presents a very difficult question of law upon which there are few if any decisions. It involves the interpretation of a very recent statute, which in some cases has worked a palpable change upon the common law as it affects the negotiability of bills of lading. John Creigh sent $1,000 to his agent with instructions to buy cotton and ship the same to him. The agent bought the cotton, delivered it to the X. R. R. Co., taking a bill of lading in which the cotton was consigned to himself. He then endorsed the bill in blank, and attach-

ing it to a draft drawn on Thompson Brown, discounted the draft at the Y bank. Brown accepted the draft and received the cotton without notice of the agent's wrong. Before he paid the draft, the cotton was replevied in his hands by Creigh.

The question to be decided is whether under the law existing previous to the passage of the act of 1866 and 1911, the agent had any right to pass title to Brown or if not, can any authorization be found in the act of 1866 or 1911, whereby Brown is entitled to the cotton.

As to the common law the rules of agency will have a material application. A bona-fide purchaser for value from an agent acting without the scope of his authority gets no title. The principal may recover the property in the hands of a third person. 31 Cyc., 1605. A purchaser of personality acquires no other title than the seller had. 12 Pa., 229, McMahon v. Sloan.

The act of 1866 making warehouse receipts and bills of lading negotiable, did not change the law where the goods were never legally in the possession of the warehouseman. 205 Pa., 403. Under this same act, an endorsee of a bill of lading gets only such title as the endorser had. 70 Pa., 188. Therefore we have found nothing yet in either the common law or in the act of 1866 which might validate the title of Brown.

As to the act of 1911, Sec. 32 of this act states that a bona-fide purchaser of a bill of lading, duly negotiated gets "such title to the goods as the person negotiating the bill to him had, or had ability to convey and also such title to the goods as the consignee and consignor had or had ability to convey." The consignee and consignor in this case are one, the defaulting agent. What title had he or had he ability to convey? This, of course, depends on what title any agent has to convey to a third person who is a bona-fide purshaser for value, when said agent is acting without the scope of his authority. He can convey none. "Property which he can identify, the principal can retake even in the hands of an innocent holder, since the agent can give no title when he has none, and this applies whether it be the identical property put into the hands of the agent or other property purchased by the agent with the proceeds. 31 Cyc., 1606. 12 Pa., 229. We are thereby of the opinion, that, according to the words of the statute, Brown got no title. For it is obvious that the agent had no title and the weight of authority declares very forcibly that he had no power to convey title.

The learned counsel for the defendant cites sec. 38 of act of 1911, to uphold his contention. As to that we might say that if the only breach of duty in the case at hand were the negotiation of the bill by the agent, our decision might be otherwise, but inasmuch as there is another antecedent breach, having the bill of lading consigned to himself, we must decide the case on different grounds.

Therefore after a serious and conscientious scrutiny of the common law, the decisions under the act of 1866 and the provisions of the act of 1911, we have failed to discover anything that might substantiate Brown's claim of title. Judgment for the plaintiff.

OPINION OF SUPERIOR COURT

Adopting a method suggested by the opinion of the learned court below. we shall discuss the rights of the parties under (1) the common law; (2) the act of 1866; (3) the act of 1911.

(1). At common law, apart from any statutory provisions, bills of lading were regarded as representatives or symbols of the goods, and whether the bills were drawn to bearer, or to the owner's order, or simply to the owner, their delivery by the owner was effective as a symbolical delivery of the goods, whether the bills were delivered with or without indorsement.

The title to the property represented by a bill could, therefore, be transferred by a delivery of the bill, with or without indorsement, whether the bill was in form negotiable or not. Nat. Bank v. Shearer, 225 Pa., 479. 4 A. & E., 546, 30 A. & E., 70. And a sale of the property effected in this manner was good as against everyone even tho no notice thereof was given to the carrier; id.

The common law did not, however, regard bills of lading, whatever their form might be, as negotiable. 4 A. & E., 35. Burdick on Sales, 182. It was therefore, held that the contract which was embodied in the bill did not pass to the transferee or indorsee so as to enable him to enforce his rights under the contract in his own name. Burdick on Sales, 182. It was also held that a bill of lading, considered as a document of title merely, did not possess all the elements of a negotiable instrument. The legal holder of a bill of lading might by a transfer of the bill transfer a better title to the goods than he had but he could not transfer any better title to the goods by a transfer of the bill than he could by a transfer of the goods themselves. The holder of a bill of lading, who had neither title to the goods nor authority to transfer them, could not therefore pass the title to the goods by a transfer of the bill, because he could not pass title by the transfer of the goods themselves. 4 A. & E., 549.

From the foregoing principles it appears that under the common law Craig would have been entitled to recover because his agent had neither title to the goods or authority to transfer them.

(2). The act of 1866 provided that bills of lading should be negotiable without reference to their form (i. e. whether drawn to order of bearer or not) unless they were marked "not negotiable." It also provided that such bills "might be transferred by endorsement and delivery." In construing the act, it was held that the latter provision was permissive only, and that the specified method of transfer was not exclusive of the other methods permitted by the common law. It was. therefore, held that a delivery of a bill by the legal holder with intent to transfer title to the goods represented thereby was effective against everyone as a transfer of the title to the goods, whether the bill did or did not contain words of negotiability (i. e. to order or bearer), and whether the bill was or was not indorsed. Sloan v. Johnson, 20 Super. Ct., 643; Richardson v. Bank, 167 Pa., 517; Harrison v. Mora, 150, Pa., 481; Holmes v. Bank, 92 Pa., 57; Bank v. Shearer, 225 Pa., 410.

It was further held that the act of 1866 rendered bills of lading negotiable to the extent of enabling the transferee thereof to enforce the rights under the contract embodied in the bill of lading in his own name, but did not render them negotiable to the extent of changing the common law rule that the transfer of a bill of lading by the person in possession thereof gave no higher title to the transferee than would the transfer of the goods themselves by the same person. Shaw v. R. R., 101 U. S., 557; Burdick on Sales, 183; Bank v. Shearer, 225 Pa., 480.

From the foregoing principles it follows that under the act of 1866, Craig would have been entitled to recover.

(3). The act of 1911 classifies bills of lading as negotiable or non-negotiable according to whether or not they contain words of negotiability. The former are negotiable representatives of the goods; the latter are merely evidence of the bailment contract.

(a). A person to whom a non-negotiable bill is transferred, acquires thereby (1) title to goods as against the transferor subject to the terms of any agreement with the transferor; (2) the right, by notifying the carrier of the transfer, to obtain the direct obligation of the carrier on the contract embodied in the bill, but prior to the notification of the carrier these rights may be lost by garnishment or attachment or execution upon the goods by a creditor of the transferor or by a notification to the carrier of a subsequent sale of the goods by the transferor.

The act by enabling the transferee of the bill to obtain the right to sue on the contract evidenced thereby in his own name gives him a right which he would not have had according to the common law, but by providing that he must notify the carrier in order to protect his title as against creditors and subsequent purchasers it imposes upon him a duty which did not exist under the common law.

(b). A person to whom a negotiable bill has been negotiated acquires thereby (1) such title to the goods as the negotiator or as the consignee or consignor, had or had power to convey to a purchaser in good faith for value, (2) the direct obligation of the carrier on the contract evidenced by the bill.

The transferee acquires two rights which he would not have acquired at common law: (1) the right to sue upon the contract evidenced by the bill in his own name; (2) such title as the consignor or consignee had power to convey to a purchaser for value in good faith. Under the common law he would have acquired only such title as *the negotiator* had or had power to convey to an innocent purchaser.

(c). A person to whom a negotiable receipt is delivered but not negotiated acquires in addition to the rights set forth under (a) supra, a right to compel the transferor to indorse the bill unless a contrary intention appears. A transfer affected as in (c) is of the same effect as a transfer effected as in (a) until an indorsement is actually made, but from that time on it is of the same effect as a transfer effected as in (b).

In the present case the bill was negotiable and was negotiated. Consequently the rules set forth under (b) are applicable. The indorsee

therefore acquired such title as the negotiator, consignee or consignor had or had power to convey to an innocent purchaser. The agent, however, who was the negotiator was also the consignee and the consignor, and had no title to the goods and no power to convey title thereto. It would seem to follow that the indorsee took no title and that therefore Craig should recover.

Reliance is placed upon the thirty-eighth section of the act which provides that the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation if the person to whom the bill was negotiated was a purchaser for value in good faith.

The purpose of this section, as we understand it, was to change, in regard to negotiable bills which have been negotiated to a purchaser for value, the common law rule that where a bill of lading is intrusted for a special purpose to an agent who is not authorized to sell the goods, a purchaser to whom the bill has been transferred by the agent without the consent of the owner, acquires no title to the goods as against the owner. Sec. 4 A. & E., 550. This section simply provides that the negotiation shall not be impaired by reason of the breach of faith. It does not attempt to define the effects of such negotiation. The effects of a negotiation are provided for in section thirty-three.

Admitting that the negotiation in the present case was a valid negotiation of the *bill* under section thirty-eight, the person to whom the bill was negotiated would under section thirty-three acquire such title to the *goods* as the agent, who was negotiator and consignor and consignee, had or had power to convey to a purchaser, and therefore he acquired no title at all.

Judgment affirmed.

BOOK REVIEW

THE LAW OF BUILDING AND LOAN ASSOCIATIONS IN PENNSYLVANIA, by Joseph H. Sundheim, of the Philadelphia Bar. Published by the Smith Edwards Company, Philadelphia.

In about 200 pages, the author of this excellent book has contrived to embody the law of Building Associations of this commonwealth. Judge Endlich's work published in 1895, exhibited the law of the subject, not only in England, but in all the American States. The scope of Mr. Sundheim's book is less comprehensive. To the practitioner in Pennsylvania it will prove a very serviceable instrument. About 225 cases have been studied in its preparation. Its material is scientifically classified. The discussions are clear and definite. The full text of all the appropriate statutes is given in the appendix. The book is an unusually good one, and its use can be cordially commended to lawyers and laymen who are interested in affairs pertaining to building associations.