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TO RE-ESTABLISH THE CONSTITUTION

Certain lawyers have discovered that the constitution is in need of re-establishment in the "minds and hearts of the people." What is the occasion? Are the people about to repeal the Union? Or make alarming changes in the distribution of power between the United States and the component states? Is the executive power about to become exorbitant and absolute? Is the legislative power of Congress at the point of becoming unduly enlarged?

What has happened is that certain members of Congress and others, are advocating an amendment to the constitution which will qualify the power of the Federal courts to declare void acts of Congress. One suggestion is that courts inferior to the Supreme Court shall be, stripped of this power (Senator LaFollette). Another is that the Supreme Court shall not declare legislative acts void except by a majority of eight to one (Senator Ladd) or by a majority of seven to two (Hayden Resolution, McSwain bill, Borah bill) or by a majority of six to three (Senator Fess).

A more alarming proposal is that Congress, by a two-thirds vote, may override a decision of the Supreme Court which nullifies an act of Congress. Senator Owen of Oklahoma proposes that Congress should have power to vacate the office of any Federal judge who has declared void, an act of Congress, and that the president should appoint a successor.

Few of the proponents allege that the declaring void by the courts, of acts of Congress, is a usurpation. Their

aim is to uphold those acts, until more than a bare majority of the Supreme Court shall have pronounced them unconstitutional. The authors of the Program and Suggestions for the celebration of Constitution Week are making themselves leaders and striving to unite the lawyers as leaders in a political party whose policy shall be in favor of the maintenance of the status quo.

Whatever may be thought of the original assumption of power by the Supreme Court, to annul acts of legislation by alleging that they are unconstitutional (and the candid investigator must concede that the defence of the power by C. J. Marshall in Marbury v. Madison, is very feeble) it has been acquiesced in by Congress, and the executive for a hundred years, and been repeatedly exercised with submission of the nation. It may plausibly be contended that this long acquiescence justifies the assumption that the power was conferred by the makers of the constitution.

But, the question now is, whether that constitution so understood, shall be subjected to amendment.

The chairman of the committee, read a paper before the Pennsylvania Bar Association, this year, under the title "Remove not the ancient landmark which thy fathers have set." He thinks these words, from Proverbs so authoritative an injunction and so pertinent that he suggests (wonderful temerity) that all the preachers of the land shall preach from them as a text, on Sunday September 16th. What did these words mean? A paraphrase of them, found in the Commentary of Lowth and Arnald. formerly in much vogue, reads, "Be content with thy own estate, and do not seek to enlarge it by invading other men's possessions, especially those to which they have an unquestionable right, having enjoyed them by long prescription, and by the consent of thy forefathers, whose constitutions ought to be had in great veneration." The injunction not fraudulently to remove landmarks, so as to dispossess persons of land properly belonging to them, is interpreted by this lawyer-preacher into being an injunction against alteration of political and legal arrangements made by our predecessors. And the preachers are encouraged to give a twist to the meaning of the proverbialist's words, and impress their hearers with a fictitious interpretation of them.

What could be absurder than to suggest to an American citizen, student of constitution or not, that it is wrong to alter or amend the constitution, out of reverence for the

generation that adopted it. The preacher is to be cajoled into preaching the sinfulness of alteration of the original arrangements, by having his attention directed to the 1st amendment, which prevents the establishment of religion.

The writer of the pamphlet does not seem to know that satisfaction with the complete divorce of the United States, in its constitution, from religion, is not by any means universal among the ministers. There are always many who think that the constitution should recognize the existence of God, and the truth of Christianity. It is somewhat singular that the ministers are asked to preach on the first amendment to the constitution. And is it not a little singular that a removal of one of the landmarks, (that concerning the power of the Congress over religion) should be the occasion of sermons on the impropriety of removing the ancient landmarks?

The 11th amendment was a withdrawal of judicial powers from federal courts in suits by individuals against states. Chisholm had a money claim against Georgia, and brought assumpsit in the Supreme Courts against that state. That court asserted its right to entertain the suit and gave judgment for Chisholm. The decision, said Bradley, J., in Hans v. Louisianna, 134 U. S. 1, "created such a shock of surprise throughout the country, that at the first meeting of Congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states. The amendment expressing the will of the ultimate sovereignity of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court." Either this act was an amendment to the constitution, or it was a repeal of the decision of the court. There was not much squeamishness about removing the ancient landmark.

Another defect was discovered, respecting so important a question as the election of the President. The 12th amendment, removed another "landmark" in 1804.

The "fathers" had set up the institution of slavery and guarded it against violations of the masters' rights. But, this landmark was swept away, by the 13th amendment.

Grave alterations of the power of the states were introduced by the 14th amendment. Their legislation was subjected to the power of the Supreme Court to annul it, on grounds not previously relevant. They can no longer deprive any person of life, liberty, or property, if in the

opinion of the Supreme Court, that deprivation is "without due process of law," a phrase so vague as to impose no substantial limitation on the court's power of annulment. This was a tremendous change in the "landmark."

Since that, we have seen the power to vote made free from denial by the states on account of a race, color, or previous condition of servitude; the congressional power to tax incomes—though the tax be direct—without respect to the population of the states; the shifting of the power to elect senators, from the state legislatures, to the voters; the prohibition amendment, and the making of the power to vote asexual.

Now, certain citizens are agitating, for another change, in the jurisdiction of the Supreme Court, and certain lawyers are denouncing the act as a violation of the maxim of the book of Proverbs. How silly!

A suggestion of Senator Robert L. Owen, of Oklahoma, is that the appellate power of the Supreme Court is virtually under the control of Congress; and that therefore Congress may deny to it jurisdiction of cases arising under certain acts, or involving certain questions. The McArdle case furnishes a specimen. In a habeas corpus case, McArdle appealed to the Supreme Court. The court first heard an argument as to its jurisdiction. This it decided that it had. It later heard an argument on the merits. When it was about to pronounce judgment, Congress, fearing that it would decide the Reconstruction acts unconstitutional, passed a law withdrawing its power to entertain an appeal in that kind of case. The Supreme Court, nothing loath to escape from the necessity of antagonizing Congress, dismissed the case for want of jurisdiction. The earlier statute had given it jurisdiction; the later repealed it. It seems then consonant with settled principles, to hold that Congress can define the cases in which the Supreme Court shall have appellate jurisdiction, and, even after the court has in a given case, taken jurisdiction, that jurisdiction can be withdrawn at any time prior to judgment, although the withdrawal is to prevent an adjudication upon the constitutionality of a law of Congress.

If Congress can unconditionally destroy the appellate power, might it not limit the jurisdiction to cases in which the court is ready to pronounce unanimous judgment; or one concurred is by 8, or 7 justices?

Congress can enlarge the court, say, to 15 judges, and require a majority, that is eight judges, to pronounce judg-

ment. Why can it not require 8 judges, without increasing the size of the court? If the writer of the brochure has any reasons to allege, against these devices, why are they not stated?

This is an age when many lawyers who have but little penetrated the principles of the constitution, are fond of chattering about certain "great" decisions of the Chief Justice, and the author of the "Shibboleth" devotes several pages to a vague and uncomprehending praise of certain decisions. We have noted that in the Marbury, the McCullochs, the Cohens, the Gibbons cases there was no difference of opinion. The judgment then, is, in no peculiar sense that of Marshall.

In Fletcher v. Peck, there was no dissent from the decree, but Johnson, J., differed from the ground on which it was rested. He thought the "reason and nature of things," a principle which would impose laws even on the Deity, should be the reason for the decision.

In Dartmouth College v. Woodward, Duvall, J., dissented. The other justices agreed, Story and Marshall writing separate opinions.

In Brown v. Maryland, Thompson, J. dissented. From this exhibit, how little basis there is for attributing the decisions to Marshall, is apparent. If the decisions are meritorious, five of the six judges share the merit equally, in the absence of evidence that they were won over by the logic and learning of Marshall, from antagonistic positions.

But, let us look at the brochure, to discover the writer's grounds of landation.

The first case is Marbury v. Madison. It is described as holding (a) that an act of Congress repugnant to the constitution is void, and (b) that the mandates of the Supreme Court "must be enforced even as against the President of the United States." The last proposition is wholly erroneous. The President was not a party to the suit. Had the Justice said what is attributed to him, his statement would have been extra-judicial. Besides, what is enforcement even as against the President? Enforced how? There was an occasion when a judgment of the Supreme Court against the State of Georgia was practically made null, because the President of the United States refused to aid in its execution. If the judgment was against the President himself, and he chose to disobey it, would the Chief Justice and his associates march against the White House to capture and imprison as for contempt, the President? There

was once a case in which the President refused to obey a subpoena, as a witness. There was no punishment. But, the case contains not the shadow of the principle that the order of the Supreme Court "must be enforced even as against the President." It is a pity that a pamphlet with so ambitious a purpose, and emanating from so dignified a body of lawyers, should contain such inaccurate and misleading statements.

The other statement, viz. that the case holds that an act of Congress that contravenes the constitution is void is correct. But, it is only a dictum. The court holds that it has no jurisdiction of Marbury's suit. Well, then, its sole duty was to dismiss the case, not to indulge in a prolix discussion of matters, treatment of which would have been proper, only if the court had had jurisdiction.

This case recalls another famous case, Dred Scott v. Sanford. The court held that it had no jurisdiction except to dismiss the appeal, because the court below had had no jurisdiction of the case. The only basis of jurisdiction would have been that Scott was a citizen of Missouri, while Sanford was a citizen of another state. The court concludes that Scott was not, could not be, a citizen of Missouri, and therefore could not maintain the suit in the circuit court of the United States. But, the court, eager to plunge into the political arena, instead of simply reversing the decision for lack of jurisdiction in the court below, went into a protracted discussion of the constitutionality of the Missouri compromise. These are two pernicious examples of justices going beyond the matter before them, for the purpose, in one, of censoriously lecturing the President; and in the other, of denouncing as void an act of Congress.

Fletcher v. Peck, is said in the pamphlet to hold the constitution controls even the acts of a state legislature, and that the Supreme Court has the power to declare unconstitutional acts void and that the authority of the states is subject to the provisions of the constitution. This is a very unenlightening statement. Almost every member of the Georgia legislature having received bribes from a group of persons whom we shall call X, passed an act conveying immense tracts of land belonging to the state to X. A subsequent legislature declared the conveyance void, for fraud. A part of this land had been conveyed to one who had no notice of thefraud. The Supreme Court holds that after the land reached a bonafide purchaser without notice, the con-

veyance was no longer capable of annulment by the state, and that, such annulment, when possible, must be by a court and not by the legislature. The doctrine of the court is summed up by the statement, "the state of Georgia was constrained either by general principles which are common to our free institutions or by the particular provisions of the constitution of the United States from passing a law which would impair the title of the purchaser of the land."

The legislature of Georgia passed an act of repeal, by which it virtually asserted (a) that a fraud by a grantee of land, upon the grantor, will make voidable the grant; and (b) that this power to avoid the grant will avail not only as against the grantee, but as against a grantee of this grantee, who paid a fair price, and was ignorant of the fraud of his immediate grantor. Marshall, J., does not repudiate distinctly either of these propositions. To allege that Georgia was restrained by general principles which are common to our free institutions is to say nothing of value. What are the free institutions? What the principles common to them? Where did the Supreme Court get the power to restrain the state by general principles? Principles incorporated into the institution, which the state is prohibited from ignoring, are one thing. But not such principles are intended. But, the opinion leaves uncertain whether it is the principles common to our free institutions that condemn the act of the Georgia legislature or whether it is "the particular provisions of the constitution" that vitiate it. What can be said in defense of a decree annulling the act of the legislature of a state, on the ground that a general principle of free institutions, not expressed in the Federal Constitution, could be detected by the Supreme Court and enforced against the legislative power of a state?

Where in the constitution is the doctrine found that if a grantor is defrauded into making the grant, he is not precluded from denying the obligations of the transactions, but that, if the vendee finds an innocent purchaser he may make that purchaser's title indefeasible; that is, the vendor must be postponed to the ultimate vendee, in the consideration of equity.

McCullough v. Maryland holds that the Congress could incorporate a bank and authorize it to operate in states, and that states could not by taxation or otherwise, interfere with the bank's operations, e. g. by requiring the bank to pay the state yearly for its notes of circulation.

In Cohens v. Virginia, the question was whether one who sold in Virginia a lottery ticket issued in Washington, was punishable under the law of Virginia. Congress had authorized the lottery and the sale of tickets, but had not indicated that it intended that such tickets should be saleable anywhere outside of the District of Columbia. Had the court discovered the purpose in Congress to make the tickets vendible any where, the Virginia act would probably have been held inapplicable to the sale, but it was allowed to be applicable, because nothing indicated that Congress intended to interfere with the policy of states.

Gibbons v. Ogden holds that since Congress has power over interstate commerce, and since navigation from a point in one state to a point in another state, is interstate commerce, New York could not exclude inter-state commerce on the Hudson, even for the purpose of protecting from competition, one who was navigating the Hudson, as a reward for the invention of steam navigation.

In Dartmouth College v. Woodward, it was held that there was a contract between the state of New Hampshire and the college which imposed an obligation on the state, to refrain from alteration of the constitution of the college, that the act of the state of 27th June, 1816, "to amend the charter and enlarge and improve the corporation of Dartmouth College," which materially changed the composition of the corporation was a violation of this obligation, and so was forbidden by the injunction in the constitution, that no state shall pass any law impairing the obligations of a contract. But, serious difficulties beset this view, which the opinions of Marshall and Storey did not assist us to remove. The charter was made by George III of Great Britain, in 1769. If it was a contract it was a contract between Great Britain, whom the king represented, and Dr. Wheelock and the other aplicants for the charter. But, did the contract impose an obligation on Great Britain? The king lords and commons, in Parliament, could do anything. Four years before the incorporation of the college, Blackstone in his commentaries had said of it: "It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, eclesiastical or temporal, civil, military, maritime or criminal, this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these king-

doms * * * * So long therefore as the English constitution lasts we may venture to affirm that the powers of parliament is absolute and without control." Book I, p. 163, 164. There was then no such obligation as made revocation or alteration by Great Britain impossible.

When New Hampshire became independent, the uncontrollable power of Great Britain, passed to it. And so much of this power passed to the government which the state chose to create, as it chose to bestow. If it enacted a constitution which withheld the power to rescind charters, the rescission was invalid, because a violation of the states constitution but not because of anything in the Federal constitution. Although the state legislature might not have had the power, because not given to it by the sovereign people, the power remained with that people.

In order to apply the prohibition against a state's impairing the obligation of contract, a contract must exist, and there must be an obligation to continue to let it exist unchanged. The court fails to show this obligation. In fact, it is absurd to speak of a legal obligation of a sovereign towards its own subjects. The fact that the state in its constitution withholds from its government, the power to alter or rescind a charter, does not imply that it, the state, is not omnipotent. State and its government for the time being, are different things. The omnipotent state, in forming its government, may grant only a portion of its power to its organs.

The omnipotence of Britain over its institutions, passed with the Revolution, to New Hampshire. It remained until state submitted to the constitution of the United States, in which it yielded a portion of its power. It did not make obligatory arrangements previously made by it, and which there was no legal obligation to maintain. What it did was to deny itself the power of passing laws impairing a preexisting obligation.

When New Hampshire, the 9th state, ratified the constitutions, it did not make irrefragable agreements not previously so. It denied to itself only the right to impair contractual obligations. There was no obligation to continue Dartmouth College unchanged, in 1788, 1789, 1790, 1800, 1816. Hence the legislation of 1816 impaired no obligation.

The question how New Hampshire became a party to a contract, in the place of Great Britain, is slurred over by the opinion. Nor is there explanation of the assumption

that the repealable undertaking of Britain, to leave unchanged the charters became irrepealable, with the devolution of sovereignty from Britain upon New Hampshire.

The mischievous consequences of the decision have been rectified by the statement in constitution or statute, that all charters shall be repealable, a principle recognized in Great Britain without explicit statement.

In Brown v. State of Maryland, Brown was indicted for having sold imported goods without complying with the statute which required the payment of a license tax of $50. From his conviction he appealed to the Supreme Court of the United States, contending, in that court, that (a) requiring such a license was putting a tax on imports, although the state had no constitutional power so to do; and (b) that requiring such license was an interference with the international commerce power of Congress. Things are imported in order to be sold. If the state can impose a tax on their sale, after the importation, it can impede importation by lessening the motives to import. But, a thing imported remains forever an import. Is it then forever exempt from state taxation or control? No, says C. J. Marshall, and he suggests that the import has "perhaps (how timid) lost its distinctive character as an import and has become subject to the taxing power of the state," when? When it can no longer be known that it had been imported? That would be sensible. No, but it ceases to be an import by being lifted out of the package in which it was, when it entered the state, or by being sold even in the original package, by the person who imported it. And on this "perhaps" of the Chief Justice has been built up a series of wonderful decisions concerning original packages. To tax the importer for the sale of the contents of the package is to impede importation suggests the justice. He does not seem to see that to tax the purchaser from him, is to dissuade him from the purchase, and to dissuade from purchasing from the importer, is to dissuade the importer from importing. Hence a tax on anything imported is a tax on imports. The absurdities lurking in the conceptions of the justice do not seem to have attracted his own notice or that of his successors, writers of several surprising decisions on the original package absurdity. The constitution does not distinguish between importation for wholesale and importations for retail sale, but the decisions protect the former, and not the latter from state interference. As the Supreme Court has made the commerce clause of the constitution, an importer can be in-

terfered with by state legislature, if he imports in order to sell in smaller bulks than that in which the articlle is introduced, but not if he intends to sell in the same bulk, provided the bulk is large, a wholly unwarranted distinction. There is urgent need of a common sense revision of the decisions concerning the original package; and of the suppression of some of them that have turned on the bulk of the package.

It is a pity that the obsequious temper of many lawyers, prevents a candid and effective criticism of the judicial logic. The lawyers who oft appear in the Supreme Court, do not, even had they the ability, permit themselves to weigh dispassionately and candidlly, the judicial compositions, a misfortune for the justices, no less than for the country.

MOOT COURT

X BANK v. DAVIS

Promissory Notes—Liability of Endorser—Notice of Dishonor—Protest—Mail Notice—Act of May 16, 1901, P. L. 194—Negotiable Instruments Act

STATEMENT OF FACTS

A made a note, payable to B or order. Davis indorsed this note before its delivery to B. B subsequently indorsed it to the plaintiff Bank. Clerk discounted it.

The Notary's certificate of protest asserted notice of A's non-payment of the note, demand having been made on A on the day of maturity, and notice of the non-payment sent the same day by mail to Davis. To contradict this certificate, Davis testified that no notice came to him. The court said the jury may decide whether the certificate was true.

Davis alleged that he indorsed for the accommodation of B, and that he had notified the bank to collect the money from B. This notice was orally given.

Davis proved that the plaintiff Bank had agreed with B not to require him to pay until it had obtained a judgment against Davis.

Verdict for the Bank. Motion for a new trial.

Davis, for the Plaintiff.

Fager, for the Defendant.

OPINION OF THE COURT

BAILEY, J. Sec. 105 of the Negotiable Instruments Act of May 16, 1901, P. L. 194, states that: "Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails." It was immaterial in the case at bar whether or not Davis received the notice, provided it was sent as stated in the Notary's certificate of protest. The Act of December 14, 1854, P. L. 724 makes such a certificate prima facie evidence of the truth of the facts stated therein. Scott v. Brown, 240 Pa. 328. The trial court permitted Davis to testify that he had not received the notice, and allowed the jury to decide whether the certificate was true or not in view of that testimony. This was in no way prejudicial to the defendant and is not a ground for a new trial. In First National Bank of Hanover vs. Delone, 254 Pa. 409, the court refused

to even allow the defendant to testify that he had not received the notice, to controvert the truth of the notary's certificate.

It is contended that Davis' notice to the Bank to collect from B discharged him from further liability, but it did not have that effect. It was not a notice from a surety to a creditor to collect from the principal; B was not a primary debtor and Davis his surety. As indorsers, both were secondarily liable on the instrument, and indorsers are prima facie liable in the order in which they indorsed. Sec. 68, Negotiable Instruments Act. Donnon vs. Barnes, 272 Pa. 33. Even if B were primarily liable and Davis in the position of his surety, the notice was not in proper form, not being in writing as required by the Act of May 14, 1874, and not being accompanied by an explicit declaration that if the request was not complied with, the defendant would hold himself discharged. 90 Pa. 363.

Nor did the agreement between the plaintiff Bank and B, not to require B to pay until it had obtained a judgment against Davis, discharge Davis. It is clear that the bank, a holder in due course, in the absence of any agreement with B, the payee, could have elected whether to sue B or to sue Davis, the accommodation indorser. The question to be decided is whether such an agreement would, by the provisions of Sec. 120, Negotiable Instruments Act, discharge Davis. In Hanover Bank vs. Delone, 254 Pa. 409, the same question was raised, but not definitely decided as the accommodation indorser was held not to be discharged because the agreement was without consideration and therefore not binding. The present case could be disposed of on the same ground, as there is no evidence that B gave the bank any consideration, but even if the agreement had been binding, we do not believe that Davis would have been discharged.

Sec. 120 Negotiable Instruments Act says that, "A person secondarily liable on the instrument is discharged by any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party be expressly reserved." Although the Act does not expressly so state, we take it to refer to an extension of the time of payment to the principal debtor or a postponing of the right to enforce the instrument against the principal debtor. The purpose of the section is to protect the one secondarily liable from the impairment or destruction of his rights of reimbursement, subrogation and contribution. These rights are not affected by an agreement between the creditor and another who is secondarily liable as they would be if the agreement were with the one primarily liable, therefore the section must refer only to agreements with the primary debtor. As B was not primarily liable,

the agreement in this case would not come within the section and would not operate to discharge Davis.

But even if we should assume that B was primarilly liable, the right of recourse against Davis was expressly reserved, and he would not be discharged.

As there was no error, the motion for a new trial is dismissed.

OPINION OF SUPREME COURT

It is regrettable that the exact case submitted, is not returned to us. We cannot be sure, in its absence, that the correct interpretation of it has been made by counsel, or the trial court. In the case as reported, occurs the expression, "clerk discounts it," whose appearance, in the case as delivered, is at least doubtful.

The verdict has been for the bank, which has discounted the note. The defendant is Davis, who if liable, is liable as endorser. He endorsed before the delivery of the note to the payee, and, therefore, for the accommodation of the drawer, and not for that of the payee. "Where a person not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as endorser in accordance with the following rules. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties, etc." This note was made by A, and payable to B or order. While doubtless the parties might have agreed that Davis should endorse for the accommodation of B, and not of A, it apparently is unimportant here, whether he did so for one or the other. In either case, he would be liable to the bank.

The principal defence seems to be that Davis was not notified of the failure of the maker, to pay this note at maturity. The certificate of the notary is prima facie evidence of the facts mentioned in it, and therefore, that demand was made on the maker, on the proper day, that payment was not made, and that notice was duly sent by mail, to Davis. The notary is to be deemed a witness. The only question under the Act of 1901, is whether he sent the notice. Sending the notice by mail, is equivalent to giving notice, whether it is in fact, received or not. The only evidence that may be conceived to contradict that of the notary, is the testimony of Davis that no notice came to him. The non-receipt of the notice is explicable by other hypotheses than that of non-sending by mail. It would hardly justify a rejection of the certificate as verity. But the court allowed the jury to decide whether the certificate was true, and it has decided that it is. There is no error of which Davis can complain.

We see no reversible error in the remaining points of the case. If Davis endorsed for accommodation, he should have given written

notice to proceed against the party equitably bound to pay the debt, with distinct notification that he could hold himself discharged, were this not done.

We see no defence in the fact, if fact it be, that the plaintiff agreed with the payee, B, not to require him to pay until it had obtained a judgment against Davis. Not requiring B to pay, etc., is not equivalent to requiring Davis to pay.

AFFIRMED.

HARTPOLE v. ADAM JAMISON

Negligence—Landlord and Tenant—Defective Condition of Premises—Liability of Landlord's Trustee and Executor

STATEMENT OF FACTS

John Jamison leased to Harpole a house which he occupied. While walking about one of the rooms, a plank of the floor got out of place, tripping him and inflicting a serious injury. At this time, the lessor being dead, Adam, named in John Jamison's will as trustee and executor, was in charge of the premises. Defenses (a) contributory negligence (b) defendant is not personally liable. Verdict for plaintiff. Motion for new trial.

Newman, for the Plaintiff.

Perlstein, for the Defendant.

OPINION OF THE COURT

KAHANER, J. This is an action by a tenant for damages against an executor and trustee, in his individual capacity, for injuries occasioned by his negligence n failing properly to care for a part of the premises, which property was under defendant's sole and direct control. The defendant in this case bases his motion for a new trial upon two grounds, viz:

(1) That the plaintiff was guilty of contributory negligence and therefore could not recover.

(2) That the defendant as trustee and executor was not personally liable.

Whether or not the plaintiff, Hartpole, was guilty of contributory negligence, was a question of fact to be decided by the jury, and the jury by its verdict found that he was not guilty of contributory negligence.

The lower court could not holld the appellees in this case guilty of contributory negligence as a matter of law and take the case from the jury.

Shaffer v. Harmony Boro., 204 Pa. 339.
Esher v. Mineral Railroad, 28 Pa. Sup. 387.
Seisko v. Harleigh-Brookwood Coal Co., 244 Pa. 339.
Smith v. Standard Steel Car Co., 262 Pa. 550.

In the case at bar, the dangerous condition of the floor was not so apparent as would warrant a reasonably prudent person not to step thereon.

In the case of Shaffer v. Harmony Boro. supra, the sidewalk at the point where the accident happened was made up partly of old railroad ties which were laid side by side lengthwise along the pavement and covered with a fine furnace slag. The walk at that point was in a dangerous condition because of the holes in the ties caused by decay. The plaintiff knew that there were holes in the ties and to avoid them, stepped on a tie, some distance from a hole, which appeared to her perfectly sound and safe. This tie had decayed from the bottom or inside, and the heel of the plaintiff's shoe broke through the crust on the upper surface and she fell and was injured.

The Supreme Court in that case held that the question of the plaintiff's contributory negligence was for the jury and that a verdict and a judgment for the plaintiff should be sustained.

It is incumbent upon the owners of premises upon which persons come by invitation, express or implied, to maintain such premises in a reasonably safe condition for the contemplated use thereof and the purposes for which the invitation was extended. See Newingham v. Blair Co., 232 Pa. 511.

"Is a trustee individually liable for negligence in his representative capacity?" It is a well established rule of law that a personal representative is individually liable for torts committed by him while acting in his representative capacity and that if any cause of action arises through the negligence of an executor or trustee in managing an estate, such executor or trustee is personally liable and the action must be brought against him in his individual capacity.

See 18 Cyc. 883.
Burdine v. Raper, 7 Ala. 466.
Warren v. Banning, 21 N. Y. Sup. 883.
Wengert v. Beashore Penr & W (Pa.) 232.
Gordon v. Robinson, 1 Browne (Pa.) 325.
Brown Beef Co. v. Stevens, 12 Fed. 279.
Descher v. Franklin, 20 Ohio Cir. Ct. 56.
Wieder v. Bethlehem, 205 Pa. 186.
Weingartner v. Pomp's Trustee, 10 North. Co. (Pa.) 146.
Keating v. Stevenson et. al. 21 N. Y. App. Div. 604.
An estate is not liable for the torts of an executor.

Moulson's Estate, 1 Brewster (Pa.) 296.
Kline v. Richards, 4 Lack. Jur. (Pa.) 249.
Skivington v. Palmer, 4 Lack. Jur. (Pa.) 245.
Hay v. Parks, 7 North. Co. (Pa.) 391.
See also 24 Corpus Juris, 128 and 741.

The appellant depends on the case of Printz v. Luckas, 210 Pa. 620, for his contention, that by the Pennsylvania doctrine recovery cannot be had against a trustee in his individual capacity. He admits, however, that in that case the deed of trust provides that the trustees shall have a right to deal with the trust property as if they were the absolute owners thereof, "but without any personal liability or responsibility for the negligence of employees." He attempts to explain away the provisions in the deed of trust which exempts the trustees from personal liability by an absurd argument.

In connection with this point the appellant also cites Eisen berg v. Penna. Co., 141 Pa. 566.

In that case the trustee exercised no control over the property whatsoever. The life tenant there occupied the property in question and without the knowledge of the trustee, erected a nuisance which caused injury to a pedestrian passing the property. We fail to see what bearing that case has on the case at bar.

The defendant also cites Yerkes v. Richards, 170 Pa. 346, in support of his contention that a trust estate is properlly liable under conditions similar to the facts in our case, and that recovery against the estate will be allowed. An examination of that case shows that the question was whether the trustee was liable to a vendee for breach of contract to sell a property belonging to a trust estate. The trustee agreed to sell th property to the plaintiff, then refused to carry out his agreement, and sold the property to another person. We fail to see what bearing that case has on the case at bar.

The case of Prager v. Gordon, 78 Pa. Superior 76, the facts of which are almost identical with the case at bar, Trexler, J., who delivered the opinion of the court, held that a personal representative is liable in his individual capacity for torts committed by him and that the action must be brought against him in his individual capacity.

In view of the above cited authorities, we are of the opinion that the decision of the lower court must be affirmed and a new trial refused.

OPINION OF SUPREME COURT

The defence seems to concede that there was negligence on the part of the person who had charge of the house. The defence is

(a) contributory negligence, (b) defendant is not personally liable, that is, he should be sued as trustee and executor, and not as an individual.

There is no evidence of contributory negligence on the part of the plaintiff. No intimation is given concerning the acts or omissions conceived to be negligent. As negligence is not presumed, neither will it be believed to exist simply because it is alleged to have existed. There must be evidence. From the nature of the accident, want of care cannot be inferred. A careful man might easily trip upon a loose board, and injure himself as has the plaintiff.

That the estate represented by a trustee is not liable for losses occasioned by him, but that he personally is liable, is established by the cases cited by the learned court below. Cf. Prager v. Gordon, 78 Superior, 76, 79.

The judgment of the court below is AFFIRMED.

B. v. X.

Conveyances—Coal Land—Sale of Surface—Reservation of Right to Mine Without Liability for Surface Support—Surface Support—Natine of Right—Mines and Mining

STATEMENT OF FACTS

A, owning coal land, conveyed the surface to B, but stipulating that he should have the right to take out all the coal without liability for any injury to the surface. A, some years later, conveyed the coal to X, but saying nothing on the deed concerning the right to disturb the surface. Subsequently A devised and released to B the right to disturb the surface. Then X, in mining the coal, injured the surface. This is an action for damages.

Miss Everhart, for the Plaintiff.

Goodman, for the Defendant.

OPINION OF THE COURT

Jenkins, J. The doctrine seems to be definitely settled in Pennsylvania that when coal rights are conveyed, unless there is an express stipulation to the contrary, they are taken subject to the duty to furnish surface support. (Jones v. Wagner, 66 Pa. 429). The grantee of mineral rights cannot be freed from this duty by implication. (Williams vs Hoy, 120 Pa. 485.). The owner of the surface is entitled to absolute support, not as an easement or a right depending upon express grant, but as a common law property right. (Youghiogheny Coal Co. vs. Allegheny National Bank, 211 Pa. 319.).

Applying these principles to the case at bar, we see that, when X took the coal rights in the land in question, he must have taken them subject to the right of surface support, since he was not expressly released and a release could not be implied.

This rule has been reiterated in as late a case as Penman vs Jones, 256 Pa. 416. In that case a coal company had the power to support the surface, but it did not do so, consequently its assignee took the coal rights subject to liability for surface support.

The learned counsel for the Defendant argues against this holding with much force and logic. However, in as much as we are a court subject to review, we do not feel at liberty to disregard a rule of law so firmly established.

We do not see that a discussion of the question, as to whether or not the release of the right to support to "B" was effective, is material since the effect of the decisions above cited, is that, unless X was expressly released, he is liable to the land owner for any damages he might cause to the surface.

Therefore we must render our decision in favor of the Plaintiff.

OPINION OF SUPREME COURT

When A conveyed the surface of his land to B, he retained by stipulation, a right that otherwise he would not have had, viz., the right by the careful extraction of all the coal, to disturb the surface. A was then the owner of the coal, and of this right to affect the surface, in his mining operations. Those two property rights were however severable. The coal could be conveyed, without the right, in extracting, it to disturb the surface. It was so conveyed. This right to disturb the surface was a nominal right, in A, so long as he was not the owner of coal, but, while it could not be exercised, it could be remitted to the owner of the surface. It was so remitted. The defendant as owner of the coal, has no right, in removing it, to cause the surface to cave in, as he has done. The learned court below has properly held him liable for damages.

The judgment is AFFIRMED.

BANK vs. STERRETT

Contracts—Mortgages—Defenses—Contemporaneous Oral Agreement—Illegal Transaction

STATEMENT OF FACTS

Starrett, applied to by the officers of the bank, made a mortgage for $5000. The purpose of the officers was, to make it appear to the bank examiner that there was no deficit owing to the president's

defalcation. Sterrett offered proof that he executed the mortgage on the oral promise of the officers that he should never be called on to pay. The court excluded the offer.

Verdict for Plaintiff. Motion for a new trial.

Miss Holleran, for the Plaintiff.

Leviness, for the Defendant.

OPINION OF THE COURT

Goodis, J. The question presented by the case at bar is as to the admissability of an oral agreement made contemporaneously with the making of a written contract. Is such evidence admissable? Before we take up the direct consideration of this question, a brief review of the origin and development of the so-called parol evidence rule might be clarifying.

As recognized in England, the parol evidence rule excluded all oral evidence that would vary, contradict, or alter a written instrument. Once having deliberately expressed an agreement in writing, the law declared such writing to be not only the best, but only, evidence of that agreement. (Martin v. Berns, 67 Pa. 459.).

The severity of this rule can readily be seen. In its strictness the English rule would exclude all evidence af the promise made by one, which would contradict the instrument, notwithstanding a subsequent refusal to observe such promise, while holding on to whatever obtained by reason of it. This would hardly seem just, and would be quite as much a fraud on the promisee as any wilful suppression or misrepresentation of fact in connection with the making of the instrument. Nevertheless, that was the law, and such a promisor would be left secure in his enjoyment of the other's property, which he had not paid for. The law was unable to compel him to keep the promise, on the faith of which he had acquired the property. (Croyle v. Cambria Land & Improvement Co., 233 Pa. 310.)

It is therefore manifest that the rule, as enforced, was clearly unjust and inequitable. It was inevitable that, in order to apply the rule at all, exceptions to it would have to be recognized. And they were. Our own courts, recognizing the unjustness of the English rule, have so modfied and changed the rule by exceptions, so as to make impossible its use as a means of fraud.

At present there is perhaps no rule of law or evidence which is more flexible, or subject to a greater number of exceptions. So that, we can hardly say there is a rule at all. Each case must be decided on its own facts. Each judge, in the application of the rule, must use his own discretion in order to exercise justice. (22 Corpus Juris 1144.)

But there are certain welll recognized exceptions in Penna., Thus, parol evidence has been allowed to contradict or vary written instru-

ments in two classes of cases. First:—Where there was fraud, accident, or mistake in the creation of the instrument itself, and Second:—Where there has been an attempt to make a fraudulent use of the instrument, in violation of a promise or agreement made at the time the instrument was signed, and without it would not have been executed. (Gandy v. Weckerly, 320 Pa. 285).

With these principles in mind, we will now examine the facts of the case at bar. The defendant is sued on a mortgage which he executed to the plaintiffs. The purpose of this mortgage was to cover up a deficit of the books of the bank, owing to the defalcation of its president. Defendant offered to show a contemporaneous verbal agreement to the effect that, if defendant executed the mortgage, he would never be called on to pay it. The learned court below excluded this evidence.

Was it propertly excluded? If we apply the so called parol evidence rule in all its strictness, it was. But learned counsel for defendant contends that this case comes under one of the exceptions, and therefore the evidence should have been admitted.

Defendant claims no fraud, accident, or mistake in executing the mortgage. The first exception to the rule is therefore not applicable. Does the case at bar fall within the second exception? It would appear, at first glance, that it does. The Mortgage was given on the faith of the promise that no liability would result.

But what would be the result of allowing such evidence to be admitted? In the case at bar the mortgage was used to cover up a deficit in the Bank's account and thus deceive the bank examiner and subsequently the public in general and the depositors of the bank in particular. An actual fraud upon the innocent depositors was therefore effected by means of the mortgage given by the defendant. Was he a party to the fraud? That would depend upon whether or not he had knowledge of the use to be made of the mortgage.

The facts of the case are silent on this very important point. After careful consideration, however, we come to the conclusion that he had knowledge of the use which was going to be made of the mortgage. Why would a reasonable prudent man voluntarily consent to give a mortgagt on his property without any consideration? We therefore conclude that the defendant knew the purpose of the mortgage, and so was a party to the fraud perpetrated by the bank. Now, such being the facts, will the courts allow an exception to the parol evidence rule to be used as a means of perpetrating fraud? The reason for the exceptions to the rule was to make impossible the use of the rule in the manner in which it is now being attempted to use the exception. This, we are positive, a court of justice would not allow. (22 Corpus Juris 1219.)

In Dominion Trust Co. v. Ridal, 249 Pa. 122, the facts of which are similar to the case at bar, the mortgagor and her husband, who was former treasurer of the company, had given a mortgage to conver a shortage in the funds of the Trust Co., in view of the examination of its assets by a bank examiner. In an action upon the mortgage, the court held that it was no defense that a contemporaneous oral agreement had been made, that the mortgage should never be enforced.

The only apparent point of distinction between the facts of this case and those of the case at bar, is that in the former, the defendant was an officer of the Bank, and the facts clearly show that he knew the purpose for which the mortgage was to be used. But under our interpretation of the facts, the defendant in the case at bar also was aware of the use to be made of the mortgage.

The motion for a new trial is therefore dismissed, and judgment will be entered on the verdict.

OPINION OF SUPREME COURT

The effort of the defendant is to show that although in the mortgage he binds himself to pay $5000 to the bank it was simultaneously agreed that he should pay nothing. Such a bizarre act seems inexplicable and incredible until the explanation is furnished. Despite the so-called rule that writings cannot be contradicted by parol, an examination of the cases reveals that many of them are contradictions by parol of explicit written obligations. In Miller v. Henderson, 10 S. & R. 290, was a bond for $1000 executed by Henderson. The successful defense was that he executed it under an oral promise by the obligee that it was a "mere matter of form".

But from the admission of nullifying evidence of some sort, the admission of such evidence of all sorts cannot be justified. Here the effort is to show that the mortgage was made to deceive the bank examiner. He was to see the mortgage and assume that it was a genuine asset of the bank, whereas it was nothing. The authority cited by the learned court below, Dominion Trust Co. v. Ridall, 249 Pa. 122, and others referred to therein, justify the enforcement of the mortgage, according to its terms.

The judgment is therefore AFFIRMED.

GROSS v. LUCKETT, HAYS, TERRE TENANT

Mortgages—Scire Facias Sur Mortgage—Future Advances—Terre Tenants—Defenses

STATEMENT OF FACTS

Luckett executed to Gross a mortgage for money then advanc-

ed to him by Gross, $2000, and such further sums as might be advanced, to $5000 in all. Before an additional advance, Luckett's title was sold, on execution and judgment later than the mortgage, to Hays. Hays contends that only $2000 can be collected from him, in pursuance of the mortgage, Gross having notice of the sheriff's sale, before advancing any money beyond the $2000.

McCormick for the Plaintiff.

Forman for the Defendant.

OPINION OF THE COURT

GLENN, J. In this case the defendant admits a liability of $2000, but the plaintiff claims the defendant liable for $5000.

In a court of law the main purpose is to give justice. It is done according to certain rules and following these rules has been found to be the safest way to justice. At times some rules are lacking the quality of justice and when this is so, a different interpretation of the rule is applied in order to give justice to those who deserve it. This was the case in Land Title and Trust Co. v. Shoemaker, 257 Pa. 213. In that case the court held that future advances when made, dated back to the time of the execution of the mortgage, under the given state of facts. Although the general rule is just the opposite in regard to future advances, in order to give justice, it was necessary to hold that this rule did not apply on such a state of facts.

In that case, (257 Pa. 213) the mortgaged land had not been sold, but was still in the hands of the mortgagor. The land had been mortgaged a second time to Emma Bergdoll, who had notice of the first mortgage and all its provisions. It was held that the first mortgagee could recover for all future advances made, inasmuch as the land was still in the hands of the mortgagor, while in the case at bar the land was in the hands of a third party, a purchaser for value. It is only right in such a case as this, to hold Hays liable for the amount actually advanced at the execution of the mortgage.

The plaintiff's arguments would be considered, but he is laboring under a wrong impression. The mortgage on its face was not for $5,000, but for $2,000, and such further advances as might be made up to $5,000.

Under the plaintiff's third point he still wrongly construes the amount of the mortgage, and he states that the sale did not change the plaintiff's obligation to Luckett. We believe it did change his obligation to Luckett. Gross, the plaintiff, had a mortgage on land, not on Luckett, and when that land was sold, the plaintiff's obligations to Luckett ceased, for Hays bought subject to the mortgage and is liable for the amount on its face.

The case of Hays v. Anderson, 248 Pa., is on all fours with the present case. In that case the defendant could not sufficiently prove that only $1200 had been given him, so the decision was for the plaintiff. On appeal it was shown that the defendant had sufficiently proved his statement, so it was reversed and defendant was only liable for $1200. No reason can be seen for the plaintiff's claim, that the case cited, is not parallel with the one at bar, merely, because it was appealed on a technicality, for in reversing the decision the upper court admits the facts to be sufficient.

So, at the time of the sale, Hays is liable for the $2,000, but after the sale, the plaintiff, having notice, makes advances to the mortgagor of his own accord, and cannot hold the purchaser liable.

In the above case, the court says: "Advances made in good faith become part of the mortgage debt." We take "good faith" to be synonymous with "without notice," but the plaintiff had notice of the sale and then advanced money.

So, as is held in 36 Pa. 170, 24 Pa. 1, 27 Cyc. 1072, 19 R. C. L. 168, the doctrine still is, that where the land has been sold under execution, the future advances made do not relate back to the principal of the mortgage.

Defendant is liable for $2,000.

Judgment for Defendant.

OPINION OF SUPREME COURT

Only $2000 had been paid by the mortgagee to the mortgager, when the mortgage was made. It was made to recover the repayment of these $2000, and such further sums, not exceeding $5000 in all, as the mortgagee might subsequently loan to the mortgagor.

There was no obligation upon Gross, the lender, to lend any portion of the $5000. If he did, the mortgage was to assure the payment of the money lent.

Before any money was lent, the mortgaged premises ceased to belong to Luckett, being sold on a judgment against him which sale did not discharge the mortgage. Gross had notice of this sale. The effect of these facts was, we think, to make the mortgage useful to Gross, only for the $2000. He could not lend additional money, and hope to charge it on land which he knew, had ceased to be Luckett's. This, we understand, is the decision of the learned court below, which he properly supports by Hays v. Anderson, 248 Pa. 1.

The judgment on the scire facias for $2000 is therefore AFFIRMED.

P. S.—The omission of the statement of facts is a serious defect.

PARRY v. COAL COMPANY

Assault and Battery—Deputy Constables—Act of May 9, 1889—Coal Companies—Liability For Acts of Deputies

STATEMENT OF FACTS

Under the Act of May 9, 1889 (P. L. 156), twenty-five tax-payers petitioned the Court of Quarter Sessions to appoint deputy constables during a strike of coal miners, the coal company undertaking to pay the expenses. One of these constables used force upon the plaintiff. He treating these constables as the servants of the coal company, brings trespass for assault and battery.

Miss Everhart, for the Plaintiff.

Bitner, for the Defendant.

OPINION OF THE COURT

CAVALCANTE, J. The facts at bar present to this court the following question: Were the deputy constables servants of the coal company?

In 20 Am. & Eng. Ency. of Law (2d ed.) pages 11 and 12, it is stated: "A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling, and who in such services, remains entirely under the control and direction of the latter. A master is one who stands to another in such a relation that he not only controls the results of the work of such other, but also may direct the manner in which such work shall be done. The relation of master and servant exists where the employer has the right to select the employee; the power to remove and discharge him; and the right to direct both what work shall be done, and the way and manner in which it shall be done." In McColligan v. Pennsylvania Railroad, 214 Pa. 229, Justice Elkin pronounced the above quotation as the accepted and existing test of master and servant in this state.

The test, as laid down, reveals that three questions must be affirmatively answered before the relation can be said to exist, viz.:

(1) Did defendant have the right to select the employees (the constables, in the case at bar?)

(2) Did defendant have the power to remove and discharge them?

(3) Did defendant have the right to direct both what work was to be done, and the way and manner in which it was to be done?

In answer to (1), the act reads: "Upon the petition of not less than twenty-five tax-payers of any township of any county of this Commonwealth, to the Court of Quarter Sessions of said county, setting forth that the safety of the citizens and the security of property makes necessary, in their opinion, the appointment of one or

more deputy constables to act as policemen, it shall be the duty of the court to consider said petition and, if satisfied of the reasonableness and propriety of said application, to make such appointment for such time and number as the court may deem proper....." It is clear that if the Court of Quarter Sessions candidly and judiciously exercised the power given them by the act—and there is no evidence in the case at bar that they did not so exercise it, the constables were selected and appointed by that court and not by the coal company.

Section 3 of the act provides: "The said deputy constables shall be paid such compensation as may be approved by the Court of Quarter Sessions and may be discharged whenever the court appointing them shall be satisfied that their services are no longer required." This section dispenses with (2) without any discussion on our part. It specifically states that the court appointing the constables may discharge them when it shall be satisfied that they are no longer needed.

Section 1 further provides: "And such deputy constables so appointed shall severally possess and exercise all the powers of policemen of the cities of this commonwealth....." Section 2 provides: "Such deputy constables shall, when on duty, severally wear a shield or badge with the words 'township police' and the name of the township from which appointed inscribed thereon."

There can be no other meaning taken from these sections than that the legislature intended constables appointed thereunder to be officers of the township wherein they were appointed; and that their duties and powers were regulated by the same policies as those of city policemen. There is nothing in the act which might lead us to believe that the constables appointed thereunder were under any obligation to carry out the orders or wishes of any one individual or corporation. Their duties and powers were those of policemen of cities; and being such, the work which they were to do, and the way and manner in which it was to be done, was totally a matter of public concern and not a matter for the coal company. However, this character of public office thrown about the constables by the act, would not be sufficient to deter us from holding for the plaintiff, if, at the time the constables used force, they were acting under authority derived from or at the instigation of the defendant. But we will not concern ourselves with this latter point because there is no evidence before the court which would warrant us in doing so.

There yet remains the argument presented by the capable counsel for the plaintiff. The only ground on which he seeks to maintain this action is on defendant's undertaking to pay the expenses. But we cannot see how he can hold his ground.

In Wilhelm v. Parkersburg, M. & S. Ry. Co., 82 S. E. 1089, it is held that the fact that a statute conferred upon the officers of common carriers all the powers of conservators of the peace, did not relieve the carrier from liability for the wrongful acts of such officers. In Scibor v. Oregon-Washington R. & Nav. Co., 140 Pac. 629, the court sustained a verdict in favor of plaintiff, for damages received at the hands of a watchman who was employed and paid by the defendants, but who had been appointed as a deputy sheriff, that he might arrest anyone attempting to criminally interfere with defendants' property. In Armstrong v. Stair, 217 Mass. 534, the proprietors of a theater were helld responsible for an assault upon, and the arrest of a patron, by a special officer paid by defendants, but who had been appointed upon their request by the police commission, pursuant to a statute. In Clish v. Boston, R. B. & L. R. Co., 219 Mass. 341, a judgment was sustained in favor of plaintiff who was injured while at defendants' station, as a passenger, during a scuffle between a special officer in defendants' employ and an intoxicated man.

In all the above cited cases the special officers were appointed at the request of the defendant, and received a salary from him. It must also be noted that they were appointed pursuant to a statute, and that they could be removed at defendant's request. In the case at bar, although the coal company undertook to pay the expenses, the constables were not appointed at its request nor could it remove them at its request.

In Ruffner v. Jamison Coal and Coke Co., 247 Pa. 34, a case standing on all fours with the one at bar, the Court of Quarter Sessions appointed several deputy constables to patrol a strike zone in the coal region. One of these constables committed a battery on the plaintiff, who sought to recover from the coal company on the ground that they had paid the constable for his services. The court in that case held that paying the constables for their services did not create the relation of master and servant. We think that the case at bar is in line with Ruffner v. Jamison Coal and Coke Co., and we must so decide.

Judgment for defendants.

OPINION OF SUPREME COURT

The policemen appointed, were officers of the township. They were appointed for it, by the Court of Quarter Sessions under the authority of the Act of May 8th, 1889.

Nothing suggests that the defendant should be liable for a tort committed by one of these policemen except the fact that they were paid by the coal company. The wisdom of permitting the company to become paymaster for the policemen is very questionable.

The strike was against this company. It had a special interest in the conduct of the policemen, and the policemen, looking as they did, to the company for payment, were visibly under bias for it as against the strikers. The miners could naturally suspect the impartiality of the policemen and attribute to them, desires to favor the company as against them.

However, the learned opinion of the trial court convinces us that its judgment in favor of the company must be sustained. Possibly the tortious act of the policemen was due to too great a wish to be serviceable to the company. Nevertheless we are constrained by Ruffner v. Jamison C. & C. Co., 247 Pa. 34, relied on by the court below, and its judgment is

AFFIRMED.

BOOK REVIEWS

Cases on Trade Regulation selected from decisions of English and American Courts by Herman Olyphant, Professor of Law in Columbia University. West Publishing Co., 1923.

This is a recent addition to the invaluable series of case-books, with which lawyers and students of law have been benefitted, by the West Publishing Co. The book is divided into three parts. The first dealing with contracts not to compete; the second with Competitive Practices, and the third with Combinations. Part one treats in five chapters, of contracts in early English trade; of contracts concerning the use of skill or enterprise, of contracts accompanying the purchase of property; of contracts instrumental in apportioning business; and of contracts instrumental in creating a monopoly or a combination. Part II, dealing with Competitive Practices, is divided into nine chapters, which discuss the privilege of competing, intimidating and molesting, disparaging competitor's goods or services; apportioning competitor's trade values, inducing breach of competitor's contracts, boycotting, requiring exclusive dealing, unfair price practices, unfair advertising.

Part III, discussing combinations, concerns itself with the object of combination, the form of combination, multiple phase combinations, rights and liabilities under Federal statutes.

An appendix contains the Sherman Anti-Trust Act, the Federal Trade Commission Act, the Clayton Act, and the Webb Act. A well constructed index covers the last fourteen pages of the book.

Not to be overlooked, is a very interesting and instructive historical introduction, covering thirty-three pages. The author remarks, "Standards of conduct in trade prescribed by the law today, have an eventful, but nevertheless unbroken line of development, reaching farther back than the Black Death. Most of our current philosophical notions as to the problem of the proper relation of government to business have been bidding for acceptance throughout the centuries. Probably most important is the fact, easily overlooked,, that current trade, the thing to be regulated, and mediaeval trade, are cross sections of the same organism, and display more likenesses than differences in basic matters of structure. Finally it should be seen that our earliest and latest recorded experiments in trade con-

trol, are really contemporary, when viewed in proper perspective."

We have not counted the cases printed in the book, but there must be over 600. The volume cannot fail to be extremely serviceable to students of law, lawyers, and investigators of the history of trade of every discription. The price of the book is $5.50.

Where and How to Find the Law, a guide to the use of the Law Library, by Frank Hall Childs, LL. B., LaSalle Extension University, Chicago, 1923.

This little book of slightly more than 100 pages, may be characterized not merely as multum in parvo, but as plurimum in parvo. It is well written. Its purpose is, not to state law on given topics, but, as the title indicates, to describe the repositories of the law, and the literature that gives information covering it. The law is vast, and by a constant uninterrupted evolution, is becoming vaster. No man, not even the most learned lawyer or judge, knows at any one time, more than an exceedingly small part of it. But it exists in statutes, in printed decisions of the courts. Those are constantly being added to. Aids to the discovery of particular parts of it, are very numerous; and it is necessary that every one whose interest it is to know it, should know these media of information, and the method of using them. The book classifies law into the written and the unwritten. The written are treaties with foreign nations and with the Indian tribes. The statutes are federal and state. The various publications containing them are described. The repositories of the unwritten law are scientifically classified and described. Full information as to the reports is given, with very much valuable suggestion concerning their use. But, the merits of this book will be appreciated only by those who examine it. It would be for every student of law, and indeed for every lawyer, one of his most valued possessions. But, its utility for the students of law will bear the utmost emphasis. The price is $1.50.