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THE LEGAL CRUSADES OF THE SABBATARIANS

THE DECALOGUE

The Decalogue commands: "Remember the Sabbath day to keep it holy. Six days shalt thou labor, and do all thy work. But the seventh day is the Sabbath of the Lord, thy God; in it thou shalt not do any work."[1]

The injunction of the commandment is mandatory as well as prohibitory. It directs the performance of work

[1]Exodus XXI, 8-10. The reason given for the observance of the Sabbath is drawn from the creation, and agrees with Genesis. In a parallel passage in Deuteronomy the command to obey the Sabbath is based on the memory of the bondage in Egypt. The original commandment probably was, "Remember the Sabbath day to keep it holy." The reason given in Exodus is generally assumed to have been annexed by a hand akin to Genesis. The reason given in Deuteronomy is rather a parenthetical addition, than an original element which was omitted in Exodus.

on the six days as peremptorily as it does the abstention from work on the seventh. And apparently the sinfulness of a violation of the mandate is as great as that of an infraction of the prohibition.[2] It is true that the commandment states that the seventh day was "blessed and hallowed," and it seems that the other six days were neither blessed nor hallowed, but both the phraseology and the philosophy of the commandment justify the assumption that the hallowing of the seventh day was as much attributable to the work done on the six days at it was to the resting on the seventh. It would indeed be remarkable, if resting on the seventh day, after having rested on the previous six days, should result in the sanctification of the seventh day.

Curiously enough, however, the efforts of those who endeavor to bring about social or moral reforms through the agency of the criminal law have been confined to the negative part of the commandment. Little has been accomplished or attempted toward giving a legal sanction to the direction, "Six days shalt thou labor." Vagrancy laws, it is true, have been enacted in most jurisdictions, but their enactment has been motivated by economic rather than ethical or moral considerations.[3]

The commandment was addressed to the Jewish nation alone. It was intended to apply only to the Jews.[4] It therefore does not apply to Christians. The Decalogue itself proves this, for it begins, "I am the Lord, thy God, which have brought thee out of the land of Egypt, out of the house of bondage," and many other passages of the

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[2]The contrary is vigorously asserted in C. v. Specht 8 Pa.312; C. v. Wolf 3 S. & R. 48.

[3]39 Cyc. 1111; 8 R. C. L. 339. For the Pennsylvania statutes, see West Penna. Statutes of 1920, sec. 21409 et seq. There seems to be a conflict of opinion as to whether vagrancy was an offense at common law, 29 A. & C. Encyc. 569.

[4]37 Cyc. 539; Spurhawk v. C. 54 Pa. 401.

Old Testament confirm this view. Indeed, it has been judiciously stated that "a recapitulation of the Scripture makes it clear that the fourth commandment, which is a positive statute imposed upon the Israelites alone, as a people separated from all other nations by the Almighty for special and wise purposes, was not intended for the Gentiles or those living under a later dispensation."[5]

There is nothing in the New Testament prescribing the observance of the Sabbath or Sunday. Jesus did not command its observance; and in his reply to the young man whom he directed to keep the commandments, if he would enter eternal life, and who asked him, "Which?" Jesus did not mention the fourth commandment. The Apostles who enforce and, as it were, reenact every other commandment, never advert to the fourth. And many texts from the New Testament show that the fourth commandment was regarded as merely a ceremonial or judicial law, which was abrogated and abolished by the coming of Jesus and the completion of the Christian dispensation.

Some very famous and zealous Christians have been intransigeantly insistent upon this point. Luther, with characteristic aggressiveness, declared, "If anywhere one sets up its observance upon a Jewish foundation, then I order him to work on it, to ride on it, to dance on it, to feast on it, to do anything that will remove this encroachment on the Christian spirit and liberty." Calvin called it "a shadowy commandment which was abolished at the advent of Christ," and encouraged the burghers at Geneva by his presence and example at their public recreations, such as shooting and bowling, upon the Lord's day after their devotions at church were ended. Penn, our own great law giver, declared, "To call any day of the week a Christian Sabbath is not Christian but Jewish; give us one Scripture for it; I will give you two against it."

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[5]Sparhawk v. Union Pas. Co. 54 Pa. 401.

The commandment enjoins abstention from work on the "seventh day," which is "the Sabbath." This day is now known as Saturday. The Sunday of the Christian world is not therefore the Sabbath of the Decalogue. It is not even the successor of the Sabbath of the Decalogue. The commandment does not therefore either expressly or impliedly forbid the performance of work on Sunday.[6]

In spite of all this, however, Sunday is among the first and most sacred institutions of the Christian religion, and most people think that its sanctity is prescribed to all nations, and particularly to Christians by the fourth commandment.[7]

THE COMMON LAW

It has been frequently stated that Christianity is a part of the common law of Pennsylvania. "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania. Christianity without the spiritual artillery of European countries; not Christianity founded on any particular religious tenets; not Christianity with an established church and tithes, and spiritual courts; but Christianity with liberty of conscience to all."[8]

Since Sunday is the "holy day among Christians," and its observance is "one of the bulwarks of Christianity," and Christianity is a part of the common law, it would seem that the sanctity of Sunday should be protected by the common law. "If Christianity is a part of the common

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[6]37 Cyc. 539; Sparhawk v. Union Pas. Co. 54 Pa. 401.

[7]37 Cyc. 539; Sharhawk v. Union Pas. Co. 54 Pa. 401. "Observance of Sunday is one of the bulwarks of Christianity." Johnson v. C. 22 Pa. 102. "Sunday is the holy day among Christians." C. v. American Baseball Club, 290 Pa. 136.

[8]Sparhawk v. Union R. R. Co. 54 Pa. 401. For a recent statement to the same effect, see C. v. American Baseball Co. 290 Pa. 136. That such a statement should be made at the present time is indeed surprising.

law, it carries with it a civil obligation to abstain on the Lord's day from all worldly labor and business, except works of charity and necessity. Christianity without a Sabbath would be no Christianity."[9]

Such, however, is not the case. The common law does not forbid work or labor on Sunday, and, according to it, contracts made on Sunday are valid.[10] The fact that the common law did not attempt to prevent the profanation of Sunday proves that the statement that Christianity is a part of the common law "is really not law; it is rhetoric."[11]

LEGISLATION

Sunday legislation is more than fifteen centuries old. It originated in Rome in A. D. 321, when Constantine the Great passed an edict commanding all judges and inhabitants of cities to rest on the venerable day of the sun. The day was to be venerated as a religious duty owed to the God of the Sun. "All Sunday legislation is the product of pagan Rome; the Saxon laws were the product of the Middle Age legislation of the Holy Roman Empire; the English laws are an expansion of the Saxon; and the American are the transcript of the English."[12]

ENGLISH STATUTES

Sunday statutes were passed at an early date in England. The earlier statutes were directed against fairs, amusements, and travellers of certain kinds.[13] These were followed by the important statute of 29 Car. II. C. 7. The

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[9]Sparhawk v. Union R. R. 54 Pa. 401, per Strong, J.

[10]27 A. & E. Encyc. 388; Kepner v. Keefer 6 Watts 231, correcting a mistake in Morgan v. Richards 1 Browne 171. Judicial proceedings only were prohibited on Sunday, Rheim v. Bank 76 Pa. 132.

[11]In Re Bowman (1917) A. C. 406.

[12]C. v. Hoover 25 Super. Ct. 134.

[13]28 A. & E. Encyc. 390; 37 Cyc. 540; C. v. Hoover 25 Super. Ct. 134.

main provision of this statute was that no tradesman, artificer, workman, laborer, or other person whatsoever should do or exercise any worldly labor, business, or work of their ordinary calling upon the Lord's day, or any part thereof; works of necessity or charity alone excepted.[14]

AMERICAN STATUTES

Sunday laws, or "laws for the better observance of the Lord's day," as they were generally called, were passed in most of the colonies.[15] The earliest one was passed by the colony of Virginia in 1617, three years before the Pilgrims landed at Plymouth.[16] Sunday laws exist in practically all of the states.[17] The English statute of 29 Charles II has been made the basis of this legislation.[18] In many states it has been substantially adopted. In others the Sunday laws are more comprehensive altho it has been followed in part.[19]

PENNSYLVANIA STATUTES

Penn's views on the subject of Sunday are set forth in his works and those of Barclay. They were the views of the Society of Friends, who were the settlers of Pennsylvania. These views found expression in the laws agreed upon in England on May 5th, 1682. The thirty-sixth law provided: "That according to the good example of primitive Christians, and for the ease of creation, every first day of the week, called Sunday, people shall abstain from their common daily labor, that they may better dispose

[14]28 A. & E. Encyc. 390. This statute is said to be still in force.
[15]28 A. & E. Encyc. 390.
[16]10 Va. Law Reg. 64.
[17]28 A. & E. Encyc. 390.
[18]37 Cyc. 540.
[19]Kepner v. Keefer 6 Watts 233; 27 A. & E. Encyc. 390. The statute of 29 Charles II. furnished the model for statutes passed in Pennsylvania in 1682, 1700, and 1705. C. v. Nesbit 34 Pa. 401.

themselves to worship God according to their understanding."[20]

The very first law of the first General Assembly of Pennsylvania related to this subject. It was part of the Great Law passed at Chester on December 7th, 1682. It declared that "people shall abstain from their usual and common toil and labor" on Sunday that * * * "they may better dispose themselves to read the scripture of truth at home or to frequent such meetings of religious worship as may best suit their respective persuasions."[21]

The act of 1682 provided no penalty for its violation. It was corrected by an act passed in 1705, which in other respects reenacted the law of 1682.[22] A more elaborate act, in nearly the same language, was passed in 1705, and was allowed to become law by lapse of time in accordance with the proprietary charter, having been considered by the Queen in Council and not acted upon.[23]

The act of 1705 remained the law until March 30th, 1779, when it was repealed by an act passed for the "suppression of vice and immorality." The second section of this act provided: "That if any person shall do any work of his or her ordinary calling, or follow or do any worldly employment or business whatsoever on Lord's Day, commonly called Sunday, (works of necessity and mercy alone excepted)" he should be fined.[24]

The act of 1779 seems not to have been enforced; and the fine provided for by it, being payable in depreciated currency, having become less than a shilling in specie

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[20] C. v. Nesbit 34 Pa. 401; C. v. Hoover 25 Super Ct. 139.

[21] C. v. Nesbit 34 Pa. 401; C. v. Hoover 25 Super. Ct. 139.

[22] Statutes at Large, p., 4. This act was repealed by the Queen in Council on February 7th, 1705. 2 Statutes at Large, p., 4.

[23] 2 Statutes at Large, p., 177. These reenactments were doubtless rendered necessary by repeals of the colonial laws by the Privy Council of England.

[24] 9 Statutes at Large, p., 333.

currency, another act was passed on September 25th, 1786, which repealed the act of 1779 and prohibited under a penalty any person "doing or performing any worldly employment or business whatever on Lord's Day, commonly called Sunday (works of necessity and charity only excepted)."[25]

Finally the act of April 22nd, 1794, was passed in the year after the yellow fever devastated Philadelphia, when the scourge was widely regarded as a punishment inflicted upon the community because of increasing levity and worldliness. It repealed the act of 1786, which was "soon to expire by its own limitation." It provides that "if any person shall do or perform any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday, works of necessity and charity only excepted, every such person, so offending shall for such offense forfeit and pay four dollars * * * or in case he or she shall refuse or neglect to pay the said sum, he or she shall suffer six days imprisonment * * * ."[26]

The statute of Charles II and the earlier Pennsylvania statutes which followed it prohibited employment or business in one's ordinary calling.[27] The act of 1794 prohibits "any" worldly employment or business and enumerates exceptions. The legislature purposely made this change in the wording of the act. "They saw that the blacksmith might leave his shop and work on Sunday at making garden and building fences as it was not his ordinary calling. They forbade "any worldly business or employment whatsoever." "Under the present statute it matters not whether it is the person's ordinary calling or business or not."[28]

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[25]12 Statutes at Large, p., 313.

[26]15 Statutes at Large 110. For review of Pa. statutes see Weedman v. Marsh 4 Cl. 401.

[27]27 A. & E. Encyc. 396; Acts of 1682, 1700, and 1705.

[28]C. v. Hoover 25 Super. Ct. 139.

CONSTITUTIONALITY

The decision that the Sunday law was constitutional was a great victory for the Sabbatarians, but it was won by firing masked batteries. The constitutionality was attacked on the ground that it violated the guaranty of religious freedom.[29] It was argued that the law was unconstitutional because it attempted to exalt by law the religious beliefs of certain sects over that of others; because it controlled religious observance and interfered with the consciences of those who honestly disbelieved the asserted sanctity of the selected day; and because it gave a preference to a religious establishment or mode of worship.

The law was held to be constitutional because it was essentially a civil and not a religious regulation "whose validity was neither strengthened or weakened by the fact that the day of rest it enjoined was Sunday." Experience, the court said, had proven that one day ought to be set aside and enforced as a day of rest in every country and the first day of the week was chosen not because it was the Christian Sabbath but because it was already observed by a great majority of the people and therefore was the most convenient day to adopt. "The selection of the day of rest was a question of expediency and if, the choice falling on the first day of the week, the Jew and Seventh Day Adventists suffer the inconvenience of two successive days of withdrawal from worldly affairs, it was an incidental worldly disadvantage, temporarily injurious, it may be, to them, but conferring no superior religious position upon those who chose to worship upon the first day of the week. The law intends no preference."[30]

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[29]Sec. 3, of the Bill of rights of 1790. This provision remains unaltered at the present time. Art. I, sec. 3, Constitution of 1874. See also Art. IX, sec. 4, Constitution of 1838.

[30]Specht v. C. 8 Pa. 312. To same effect, see C. v. Wolf 3 S. & R. 48.

The motive of those who enacted the Sunday law was unquestionably to prohibit the profanation of a day regarded by them as sacred, and even if this were not the motive, the effect of law was to give a preference to one religious sect over others. The law was passed in pursuance of the idea that Christianity should be specially favored by law. Its purpose was to protect the Christian Sunday from desecration and it favors the Christian religion to the exclusion of others.[31]

The decision, however, was in accord with the decisions of other jurisdictions and the question has not been reopened.[32]

CONSTRUCTION

The law provides that any person who shall do or perform any worldly employment on Sunday and who shall "be convicted thereof * * * shall for such offense forfeit and pay four dollars." The prohibition of worldly business and employment is implied from the imposition of the penalty.[33]

The general rule is that where the legislature imposes a pecuniary penalty for the violation of a statute, the payment of the penalty may be enforced by a criminal prosecution or a civil action.[34] The Pennsylvania law has not been so construed. It is held that the "act considers a breach of the Sabbath as injurious to society; terms the complaint an

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[31]The Pennsylvania statute was modeled to some extent after the statute of Charles II, which is frankly admitted by English judges to have been passeed in the interest of Christianity. Tennell v. Ridler 5 B. & C. 406.

[32]The statute does not violate the guaranty of jury trial. C. v. Waldman 140 Pa. 89. Nor the provision concerning the title of statute. C. v. Rapp 23 D. R. 144. It is not unconstitutional because of uncertainty. C. v. American Baseball Club 290 Pa. 133.

[33]C. v. Jeandell 2 Gr. 506.

[34]U. S. v. Stevenson 215 U. S. 190; Kepner v. U. S. 213 U. S. 103.

accusation; calls the establishment of the truth of the offense charged a conviction; and that therefore the penalty cannot be recovered in a civil action.[35] A violation is a crime."[36]

The fact that a violation of the statute is a crime has probably increased the deterrent effect of the act in cases to which it is applicable. Doubtless there are persons who would not hesitate to do acts which are morally reprehensible and socially injurious, and who would with equanimity contemplate a civil verdict against them, but are loath to suffer a criminal conviction and the stigma which society has attached to it.

The decision has, however, decreased the efficacy of the statute by decreasing the scope of its application. Because a violation of the law is a crime, it has frequently been construed in accordance with the orthadox but indefensible rule that criminal statutes are to be construed strictly.[37]

It was at first held that a person might be convicted for every violation of the Sabbath committed by him even tho occurring on the same day, unless his conduct constituted one continuous transaction.[38] Otherwise, it was said, a person by paying the penalty of four dollars might "buy the privilege of breaking the Sabbath at his will and pleasure." "If such was the law, a man without conscience or who conscientiously believed that a different day should be kept, would make money by thus offending. A Jew or Seventh day Baptist might keep his store or shop open on Sunday when all others are closed and thus do a vast deal

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[35]C. v. Wolf 3 S. & R. 48.

[36]C. v. Fineberg 22 D. R. 17; C. v. Shepley 18 D. R. 133; C. v. Eyre 1 S. & R. 347; C. v. Foster 28 Super. 400; C. v. Jeandell 2 Gr. 506.

[37]37 Cyc. 543. There are authorities contra. 37 Cyc. 543. The exceptions of charity and necessity of late years are very liberally construed.

[38]Duncan v. C. 2 Pearson 213; Reiff v. C. 1 Mont. 28.

more business than on any other day in the week, the profit of which would amply repay him the fine."[39]

This view did not long prevail. It was later held that there can be but one violation by the same person on the same day, and consequently there can be but one fine imposed for that violation.[40] This rule has given rise to the very evils which the earlier cases predicted would follow if it were adopted.

In construing the statute the courts have had regard for changing conditions and have "expressed the fear that too literal an interpretation and enforcement may create an antagonism that may lead to its repeal or serious modification.[41]

SANCTION

The sanction of the statute is a penalty of four dollars. This soon proved to be inadequate to effectuate the purpose for which the statute was passed. It was "but light; far too light indeed to prevent the violation of the statute by our great corporations and capitalists who regard their own profit rather than the public welfare.[42] The courts have vigorously disavowed ability or desire to increase the severity of the sanction. The correction of this defect, they have said, was "not within the province of the courts whose duty it was simply to enforce the act as they found it."[43] "If the penalty therein provided is not a sufficient deterrent, it is for the legislature to provide another."[44]

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[39]Duncan v. C. 2 Pearson 213.

[40]Friedeborn v. C. 113 Pa. 243; 25 R. C. L. 1456.

[41]C. v. Matthews 152 Pa. 166.

[42]Friedeborn v. C. 113 Pa. 242.

[43]Friedeborn v. C. 113 Pa. 242.

[44]C. v. Smith 266 Pa. 511. See also Steckler v. Hough 1 Pitts. 240; C. v. Hoover 25 Super. 139; C. v. Fineberg 22 D. R. 17; C. v. Smith 43 C. C. 93.

Efforts have nevertheless been frequently made to have the courts increase the severity of the sanction of the statute and some of these efforts have been remarkably successful.

CONTRACTS

In construing the statute the courts have held that it makes criminal the making of "contracts" on Sunday, because the making of contracts is worldly business and employment; and from the criminality of the making of such "contracts" the courts have derived the voidness of such "contracts." They have accordingly announced that not only will they not aid in the enforcement of such promises if executory, but that they will not aid the parties to recover what they have paid or sold in pursuance of such promises. They have thus increased the penalty for this crime out of all ratio to the turpitude of the acts committed in those cases in which the violation of the statute consists of the making of a contract.[45] Previous to the statutes the common law authorized Sunday contracts. The legislature withdrew this authorization and provided a specific penalty. The courts then, as an independent prohibiting authority, issued another prohibition with an entirely dissimilar and much more severe penalty.

TORTS

An effort was made to have the courts, thru the instrumentality of the law of torts, increase still further the penalty provided by law for a violation of the statute. The courts were asked to hold, in accordance with the general principle that no man shall be allowed to found a legal claim upon his own illegal act, that no liability attached for injuries received by a person while violating

[45]17 Dickinson Law Review, p. 155; 31 Dickinson Law Review, p. 189.

the Sunday law, as his own illegal act necessarily contributed to his injury.[46]

Whenever one does an act on Sunday which is forbidden by law, and it appears that but for such act the defendant's wrongful conduct would not have injured the actor, the act is a contributing factor to the injury. Whether it shall be viewed as a sufficiently substantial factor to defeat the plaintiff's recovery for damages is a question of public policy. The courts of Pennsylvania have held that it is not as "such violation is not the efficient or proximate cause of the injury and as the time when the injury is received is only an incident and not the foundation of the action."[47]

Efforts have also been made to have the courts hold that a person engaged in a violation of the Sunday law is liable for injuries inflicted by him without other fault or negligence on his part. It was contended that when certain conduct has been made criminal by statute it is because that conduct has been found injurious or dangerous to society, and that the average careful man would not so conduct himself, and that one who does so is, therefore, negligent. The courts have refused to adopt this reasoning where the defendant's misconduct was a violation of the Sunday law.[48]

BREACH OF THE PEACE

A person may be guilty of violating the Sunday law although his conduct does not cause noise, annoyance to neighbors, breach of the peace, or interference with religious worship.[49] "It certainly cannot be contended, there-

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[46]In some states it has been so held. 37 Cyc. 373.

[47]Mohney v. Cook, 22 Pa. 342; Prollett v. Summers 106 Pa. 95; Stuckler v. Haugh 1 Pitts. 239.

[48]Temple v. Chicago R. R. Co. 60 Qa. 331, 14 N. W. 320.

[49]C. v. American Baseball Club 290 Pa. 136.

fore, that every violation of the statute is a breach of the peace. Work noiselessly and quietly done may disturb no one, and still the performer of it, if proceeded against may have to pay the penalty, but would be answerable no further.[50]

But "if worldly business or employment be of such a character as to disturb the quiet of the neighborhood, or of an individual neighbor, or be carried on in the vicinity of a place of worship so as to disturb those assembled for public worship," it is a common law misdemeanor—a breach of the peace, for which the offender may be indicted, and arrested and held for good behavior in the meantime.[51]

The reason for this rule is said to be that such occurrences may not be prevented otherwise than by treating them as breaches of the peace. "If no arrests can be made for the disturbance, incident to or caused by the worldly pursuits of individuals, then it will follow that whenever it is more profitable to carry on business by paying the penalty than to abstain from it, there will be found persons in the community ready publicly, and without regard to the peace of society to engage in it. In short four dollars will be a license fee for the right to carry on the most noisy employments, it may be, in the most public places on the Sabbath, instead of a penalty to secure its observance."[52]

The rule is not applicable, it is said, where there is a mere "disturbance of the conscience"—"a constructive disturbance." There must be an "actual" disturbance "occurring so long or so frequently and in such a place as to amount to a public disturbance."[53]

But the statute has established what may be called the "Peace of the Sabbath," to break which is a common

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[50]C. v. Jeandell 2 Grant 506.

[51]C. v. Leaman 1 Phila. 46; C. v. Jeandell 2 Gr. 506. "A breach of the peace is a common law offense." 9 C. J. 387.

[52]C. v. Jeandell 2 Grant 506.

[53]C. v. Jeandell 2 Grant 506.

law misdemeanor.[54] Business which may be carried on during week days without being the subject of complaint may become a breach of the peace on Sunday if it disturb persons in the enjoyment of the "rest" of that day.[55]

The rule does not conflict with the statute which provides that when a statute enjoins anything to be done in a particular way, or affixes a penalty to the doing of an act, the remedy of the statute shall be followed and no other.[56] The penalty imposed by the Sunday law is for the performance of worldly employment—a punishment for the act. The breach of the peace is a different offense of which the worldly employment and the manner and kind of it is only evidence. It is not covered by the Sunday law.[57]

Since a violation of the Sunday law is not itself a breach of the peace, there can be no arrest for it on view without warrant. The effect of this may be that "persons from other states may violate the Sunday law with impunity, as it is generally understood that offenses of this character are not among those for which governors of states well honor requisitions."[58]

GOOD BEHAVIOR

A statute was passed in England in 1360 authorizing justices of the peace "to take of them that be not of good fame where they shall be found, sufficient surety and main prize of their good behavior toward the king and his people."[59] This statute is in force in Pennsylvania.[60]

"The natural meaning of the words 'persons not of good fame' seems to be those who by their general evil

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[54]C. v. Jeandell 2 Grant 506.
[55]C. v. Leaman 1 Phila. 460.
[56]Sec. 183, Act of March 31, 1860 which reenacted the Act of 1806.
[57]C. v. Jeandell 2 Grant 506.
[58]C. v. Smith 43 C. C. 93.
[59]34 Ed. III Cap. 1.
[60]Robert's Dig. Brit. Stat. 339.

course and habits of life had acquired a bad reputation and were supposed to be dangerous to the community. In process of time, however, the construction of these expressions has been extended far beyond their original meaning, and persons are now commonly held to find surety for their good behavior who are not generally of ill fame but have only been charged with some particular offense."[61]

It has been held that the courts have no authority under this statute to require a person to give security to be of good behavior, who has several times been convicted of violating the Sunday law, in absence of any allegation or evidence that such violation was such as to disturb the peace or constitute a public nuisance.[62]

It was contended that one who repeatedly violated the Sunday law and upon each occasion paid the penalty, was "offensive to the moral and religious sense of the community as well as an insult to the law, and so came within the class of those whom it is the duty of the court to hold for good behavior."

The court, however, said, "The record contains nothing from which it could be inferred that there was any reasonable ground to apprehend that this defendant would commit any felony or misdemeanor, or disturb the peace, or in any way trouble, disturb or injure any of the people of the state, in their persons or property. The complaint which was at the foundation of the proceedings discloses that the purpose for which it was instituted was entirely foreign to that of the statute. If the fear that the violation of a mere police regulation, which involves no annoyance or danger to persons or property nor infraction of public peace nor the commission of a felony or misdemeanor, is such a menace to public welfare as to make it the duty of

[61]C. v. Duane 1 Binney 97; C. v. Jeandell 3 Phila. 509. Surety for good behavior is more extensive than surety of the peace and may be more easily forfeited. C. v. Duane 1 Binney 99.

[62]C. v. Foster 28 Super. 400.

the court to require him to give security of good behavior, it would seem to necessarily follow that a subsequent violation of the same police regulation would work a forfeiture of the bond. This would result in vesting in the courts the power to increase the penalty fixed for the violation by the law making authority which created the regulation.[63]

CONSPIRACY

The crime of conspiracy is a signal illustration of the philosophy of evolution as applied to the criminal law. It did not originate as a general offense at common law, but in a series of statutes, dating from the time of Edward I, enacted to remedy a specific abuse in a criminal proceedure. These statutes make clear how narrow and restricted was the early crime of conspiracy. It admitted of no broad common law generalizations; it was limited to the precise and definite language of the statutes. Only combinations to procure false indictments, or to bring false appeals, or to maintain vexatious suits, could constitute conspiracies. In the course of six centuries the crime has developed into a most comprehensive and elastic common law crime, which is vague in its outlines and uncertain in its fundamental nature, by means of which judges are enabled to enforce their own individual notions of justice and punish by criminal process such concerted conduct as seemed to them socially oppressive or undesirable.[64]

The crime is now usually defined as an agreement between two or more persons to do an unlawful act. The meaning of the term "unlawful act" as used in this definition is unique and has never been precisely defined. It has

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[63]C. v. Foster .28 Super. 400.

[64]"The law of conspiracy is in a very unsettled state. The decisions have gone on no distinctive principle; nor are they always consistent." Gibson, C. J., in Mifflin v. C. 5 W. & S. 461.

been said to include all crimes, whether common law or statutory, felony or misdemeanor, mala in se or mala prohibita.[65]

Since a violation of the Sunday law is a crime, it would seem to follow that an agreement to violate it is a criminal conspiracy. A very important and numerous class of Sunday law violations, sales, are predicated upon agreement, and it would seem to follow that the crime of conspiracy would be a convenient vehicle by which to increase the penalty for Sunday law violations.

Such is not the case. A sale on Sunday is not a criminal conspiracy, because of the qualifying principle that an agreement to commit a crime which can only be committed by the joint action of the two persons to the agreement is not a criminal conspiracy.[66]

It is, however, a crime to conspire "to obstruct and defeat the Sunday law." "If the defendant was properly convicted as we think he was, we have nothing to do with the effect of that conviction, even if it was an efficient and effective means of keeping his store closed or, as the appellant puts it, of increasing the penalty for Sunday labor. He was not indicted for Sunday labor, but for a conspiracy to defeat and obstruct the laws relating to Sunday, which is a very different thing."[67]

COSTS

Attempts have been made to increase the effecacy of the Sunday law by multiplying costs. It became the prac-

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[65]C. v. Hazen 23 Pa. 363.

[66]C. v. Bricker 74 Super. 234. "Where concert is a constituent part of a criminal act, such concert is not indictable as a conspiracy to commit the act." Shannon v. C. 14 Pa. 226. A purchaser on Sunday is not particeps criminis. C. v. Hoover 25 Super. 133. It would seem to follow that a sale on Sunday does not invoke a criminal conspiracy.

[67]C. v. Bontos 35 Super. 102.

tice where more than one person was engaged in the violation to prosecute each person separately and assess costs against each. It was finally held that this was not legal, as, under the act of March 10th, 1905, there could be only one complaint and one bill of costs where the criminal acts grew out of the same transaction.[68]

INJUNCTION

In the early period of its history the court of chancery exercised criminal jurisdiction to repress violence and restrain the lawlessness of the great against the poor and helpless.[69] But the exercise of this prerogative power grew less frequent with advancing civilization as the ordinary remedies became more effective and acts of violence and lawlessness less common.[70]

It is now generally asserted that, except where there is express statutory authority therefor, equity has no criminal jurisdiction, and that acts or omissions will not be enjoined merely on the ground that they are crimes.[71] This is the rule tho the officers whose duty it is to enforce the criminal law neglect or refuse to perform their duty.[72] The fact that the punishment provided by law for the crime is inadequate does not change the rule.[73]

The advantages of securing from equity injunctions against crime are very great. The prohibitions of the criminal law are general and each man is left to apply it to himself. The prohibition of an injunction is addressed directly to an individual. The punishments for crime are

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[68]C. v. Fineberg 22 D. R. 17; C. v. Shipley 18 D. R. 133; Lewis v. C. 3 D. & C. 551; C. v. Pfahler 44 C. C. 5.

[69]32 C. J. 275.

[70]32 C. J. 275; 31 Dickinson Law Review 195.

[71]32 C. J. 275; C. v. Smith 266 Pa. 511. For a case of express statutory authority, see C. v. Henderson 31 Super. 383.

[72]32 C. J. 276.

[73]32 C. J. 276.

generally fixed by law. The punishment for disobedience to an injunction is in the discretion of the court. For a violation of the criminal law, punishment is imposed only after plenary proceedings. The charge of violating an injunction is disposed of in a summary proceeding. By the device of having a court determine the particular acts which constitute the offense, and having the person likely to commit the offense enjoined, the charge of subsequent guilt may be disposed of summarily, without preliminary hearing, indictment by grand jury, or trial by jury. These advantages have led to a gradual, but persistent and continual enlargement of the power of the courts of equity to grant injunctions and to a movement to extend this most effective of the preventitive remedies developed in the past on the civil side of the law.

The Pennsylvania courts have, however, uniformly refused to enjoin acts merely because they were violations of the Sunday law. "They have refused to do so at the suit of an individual or the Commonwealth and whether the injunction was sought against a private person or a corporation.[74] That equity can restrain such violations is unsupported by reason or any known authority. For what was made an offense by the act it provides a penalty. The remedy is to be found in the act. If the penalty therein provided is not a sufficient deterrent, it is for the legislature to provide another."[75]

It is well settled, however, that where an injunction is otherwise warranted by the principles of equity to protect the rights of another, the mere fact that a criminal act must be enjoined as incidental to such protection will not deprive the court of its jurisdiction. The power of the court to enjoin acts threatening irreparable injury cannot

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[74]C. v. Smith 266 Pa. 511; Sparkawk v. Union Pas. R. R. Co. 54 Pa. 401.

[75]C. v. Smith 290 Pa. 511.

be divested because the act happens to be a violation of the criminal law. The criminality of the act neither gives nor divests jurisdiction. This distinction has been adopted in reference to enjoining acts in violation of the Sunday law.[76] Furthermore, if a particular violation amounts to a public nuisance, it may be enjoined at the suit of the Commonwealth.[77]

QUO WARRANTO

The latest device for increasing the severity of the sanction is quo warranto. It has been held that in quo warranto proceedings, brought by the Commonwealth, a decree may be rendered restraining a corporation from violating the Sunday law.[78] "It has been our policy from an early date not to limit the use of the quo warranto proceedings. There can be no doubt that a corporation may be proceeded against by quo warranto for a misuse or perversion of the franchise conferred upon it by the state notwithstanding its officers and agents may at the same time be amenable to the criminal law."

Quo warranto proceedings are so ancient that their original character is a matter of conjecture.[79] It is now generally held that they may be used to prevent corporations from committing criminal acts, tho this is a widened and historically incorrect use which can be justified only as a matter of practical necessity, and is within the discretion of the court.[80]

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[76]Sparkawk v. Union R. R. 54 Pa. 401.

[77]C. v. Smith 290 Pa. 511.

[78]C. v. American Baseball Club 290 Pa. 139. The Penna. statute authorizes the issuance of an injunction in such proceedings. Obedience to this injunction may be compelled in like manner as in other cases of injunction. Penna. Statutes (West) 1920, sec. 18, 364.

[79]41 Harvard Law Review 244; 32 Cyc. 1413.

[80]37 Yale Law Journal 245; 41 Har. Law Rev. 247.

Quo warranto should be used for this purpose only "'where the offense is serious and the existing penalty not a sufficient deterrent."[81]

The Pennsylvania court found that where the violation consisted of playing professional baseball, the public interest and lack of another adequate remedy necessary to the maintenance of the action were present, and disregarded objections based on the historical nature of the action. "It is doubtful whether other jurisdictions would consider playing professional baseball on Sunday so objectionable as to warrant proceedings in quo warranto."[82]

CONCLUSION

A crusade is defined as any concerted movement, vigorously prosecuted, in behalf of an idea or principle or in the interest of reform. The word has sometimes a connotation of futility. A Sabbatarian is defined as a Christian who observes Sunday with strictness, regarding the fourth commandment as applicable to its observance. The term is often used as one of reproach to indicate a bigoted or overstrict observer. This article, we hope, has made the implications of its title sufficiently obvious.

WALTER HARRISON HITCHLER

[81]37 Yale Law J. 245. "Only-when there is such a serious abuse that dissolution or substantial limitation is necessary." 41 Har. Law Rev. 248.

[82]37 Yale Law J. 245.

MOOT COURT

COMMONWEALTH v. CONNELL

Summary Proceedings—No Payment of Costs on Acquittal —Pecuniary Interests—Not Due Process

STATEMENT OF FACTS

Connell was arrested by a state patrolman for reckleess driving. He was tried before a Justice of Peace of Pennsburg, a borough in a county with a population of 50,000. He was found guilty and sentenced to pay fine and costs. He appealed to Court of Quarter Sessions on ground of lack of due process because of pecuniary interest of J. of P. Court of Quarter Sessions dismissed appeal, and Connell appeals to this court.

Goodman, for Commonwealth.

Carpenter, for Defendant.

OPINION OF THE COURT

Schwartz, J. Appeal is taken by defendant on ground of pecuniary interest of Justice of the Peace. A careful survey of the qustion failed to disclose any cases on point in this jurisdiction. What was the pecuniary interest of the Justice of the Peace? Both counsels assume it to be the interest of the Justice of the Peace to get the costs. If this is the pecuniary interest referred to we think that the contentions of the defendant should be sustained. A direct pecuniary interest of a judge in the outcome of a case disqualifies him and makes him an improper person to try that case. Northampton v. Smith, 11 Met. (Mass.) 390; State v. Winger, 37 Ohio 153. Did the Justice of the Peace have a direct pecuniary interest? If the defendant was fined, the Justice of the Peace got costs; if not, he did not get anything. Can we, in view of that, say that the Justice of the Peace didn't have a pecuniary interest when his own decision would determine whether or not he is to receive a certain sum of money? And if the costs, instead of being paid directly to the Justice of the Peace, were paid to the State and out of that the Justice of the Peace received the costs; the same pecuniary interest of the Justice of the Peace would disqualify him. The only difference

would be as to the directness of the interest but in the end it would all depend upon the decision of the Justice of the Peace.

Further, any Act of the Legislature which gives to the Justice of the Peace the right to try cases and provides for him to receive costs directly or indirectly is unconstitutional because it deprives the defendant of his property, to wit, money, without due process of law.

The rule of law that no man can be judge in a case in which he is interested is plainly founded in human nature and so firmly established in the immutable principles of justice that it must be regarded as a fundamental rule of judicial conduct. Justice cannot, in any proper sense, be judically administered by any man, however well disposed he may be, if his decision is preconceived because of his interest in the case.

If the interest of the Justice of the Peace, referred to in this case, is not costs but something else, for example, that he would have to pay the fine for the defendant because of some relationship as master and servant, father and son, partners, or guardian and ward, etc., he would be disqualified because of his pecuniary interest. 2 C. C. 642; 2 C. C. 134.

In the court of Common Pleas, there are two grounds for change of venue; close relationship of the parties and a pecuniary interest of the judge. By analogy we can see that the same ought to apply to the courts of the Justice of the Peace. We therefore reverse the decision of the Court of Quarter Sessions.

OPINION OF SUPREME COURT

The defense offered is that the defendant has been denied due process of law because his case was heard by a Justice of the Peace who was pecuniarily interested in the case. The defendant claims that the failure of the Justice to receive his costs when the defendant is acquitted, and his receipt of them when the defendant is convicted, is a potent and direct incentive to find all guilty. This raises the incidental questions; does the Justice receive costs on conviction; does he not receive costs on acquittal. The case of Commonwealth v. Barnhart, 22 D. R. 246, held that when a statute does not expressly impose costs in addition to a fine they may not be assessed against the defendant. Sec. 33, as amended, of the Act of June 14, 1923, P. L. 718 imposes a fine but says nothing of the costs. But Commonwealth v. Evans, 59 Super. 607, 613 settled any uncertainty caused by this lower court decision. The Evans case holds that defendants on conviction are liable for costs even tho not imposed by the statute making the act an indictable crime or an offense tried summarily.

On acquittal may the costs be imposed on the defendant? Act

of Sept. 23, 1791, 3 Sm. L. 37 forbade the assessing of costs on acquitted persons. See Lehigh Co. v. Shock, 113 Pa. 373. In such a case may the costs be placed on the county? The county is not liable for costs in summary cases unless expressly made so by statute. Dougherty v. Cumberland Co., 26 Super. 610. No statute has been found placing the costs in such cases on either the county or state. Hence we must decide that in case of acquittal, the Justice receives no costs.

The case of Tumey v. Ohio, 47 U. S. Sup. Ct. 437 (1927) holds that a mayor, who will receive no costs on acquittal, is pecuniarily interested and a trial before him deprives the defendant of due process of law. The judgment is legally unassailable and eminently correct. The evils such a system has led to in this state are so well known as to need no comment. The situation in the instant case is identical with that in Tumey v. Ohio. Such an interest is not insignificant but substantial and controlling.

It is interesting to note that Chief Justice Taft, the writer of the opinion in Tumey v. Ohio, does not include Pennsylvania in the list of states permitting this nefarious practice. He says, "In other states, than those mentioned, (which does not include Pennsylvania), the minor courts are paid for their services by the state or county regardless of acquittal or conviction." We are unable to account for this mistaken belief but as pointed out above, such is not the case.

The judgment of the court below is affirmed.

COMMONWEALTH v. TENSION

Intoxicating Liquor—Seizure Under Defective Warrant—Entry of Dwelling—Suppression of Evidence—Return of Liquor—Act of March 27, 1923, P. L. 34

STATEMENT OF FACTS

Petition of defendant for rule to show cause why search warrant should not be quashed and all the evidence, secured by means of the same, suppressed. He avers and it was admitted that the search occurred in his dwelling house and that the officer making the complaint as the basis for issuing the warrant had no knowledge or evidence of any sale occurring on the premises. Commonwealth contends that the petition is insufficient in not averring that the

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liquor was the lawful property of the petitioner or that seizure adversely affected his interest.

Cutler, for Commonwealth.

Ferrarro, for Defendant.

OPINION OF THE COURT

Howley, J. These facts present two questions for decision. First, whether or not the issuance of the search warrant was lawful? Second, whether or not evidence secured by means of the same should be suppressed?

As to the legality of the search warrant, we are guided in our observations by the Fourth Amendment to the Constitution of the United States, which states that, "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized."

Article I, Section 8, of the Constitution of Pennsylvania has practically the same provision. It provides that the "people shall be secure in their persons, houses, papers and possessions from unreaonable searches and seizures and no warrant, to search any place or to seize any persons or things shall issue, without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by affiant."

Probable cause deals with the affiant's belief based upon reasonable grounds, and not with the guilt or innocence of the accused or whether an offense has been committed in fact. (24 R. C. L. 707, Pp. 9).

Under the facts stated, the officer, therefore did not have probable cause for causing the warrant to be issued.

Since the advent of the Prohibition Act, a Federal question, we have had provisions made by the Pennsylvania Legislature concerning the traffic in intoxicating liquors. The specific act is that of March 27, 1923, P. L. 34. It states that the essential requirements to obtain a search warrant in these cases, are that "the complainants must allege, on oath or affirmation that there is probable cause to believe, and that he has just and reasonable grounds for believing, that intoxicating liquor is unlawfully manufactured, sold or possessed in the place desired to be searched, (describing it), and the probable cause for such belief must also be set forth in the complaint."

Section 8 of the same Act provides that "no search warrant shall be issued to search any private dwelling, occupied as such, unless it is being used in part—for some business purpose."

A search warrant is improperly issued which fails to stricly comply with the requirements of the above. It is therefore the opinion of the court that the search warrant was illegal because it was issued in violation of the above constitutional provisions and the provisions of the Act of March 27, 1923.

Regarding the question whether or not evidence obtained by a search warrant illegally issued should be suppressed, we find that even though the search warrant was illegal, it does not follow that evidence obtained by means of it should be suppressed. Commonwealth v. Schwartz, 82 Superior 369; Commonwealth v. Ruben, 82 Superior 315.

Section 4 of the Act of March 27, 1923, states that, "proof of possession of such intoxicating liquors shall be prima facie evidence that same was acquired, possessed and used in violation of the Act." This throws the burden of proof upon the defendant to show that the liquor was lawfully possessed. We find the following cases in point which hold that although intoxicating liquors had been discovered under defective warrants it became the duty of the defendant to show that he held the liquor lawfully and that no return of the liquor would be made until the defendant clearly established that the same was held lawfully, as provided by the Act. Commonwealth v. Scanlon, 84 Superior 569; Commonwealth v. Premier Beverage Co. 6 D. & C. 647; Commonwealth v. Dabberio, 7 D. & C. 622.

OPINION OF SUPREME COURT

There can be no question that the search warrant in the instant case was unlawfully issued. What effect has this on the property seized under the warrant? The property so seized may be used as evidence against the defendant and this notwithstanding the constitutional immunity against forced self-testimony, Com. v. Dabbierio, 290 Pa. 174. Even tho the warrant was unlawfully possessed, the possession would have the same character if the property were returned and a legal warrant and reseizure could take place at once. Com. v. Rubin, 82 Super. 315. In order to have the property returned or the evidence suppressed there must be allegation and proof that the property was lawfully possessed. Unlawfully possessed liquor is contraband and there can be no property right therein. In order to have a property right the defendant must prove lawful possession. He has not done so and his rule is discharged. See Com. v. Schwartz, 82 Super. 368 and Com. v. Donovan, IX Erie County Law Journal, 206.

COHEN v. PHILADELPHIA CHAIR COMPANY

Contract—Sale of Personal Property—Delivery of Possession—Act of May 19, 1915, P. L. 543

STATEMENT OF FACTS

Cohen and two others severally made contracts with the defendant to purchase the supply of chairs which the company had in its warehouse. Cohen paid the purchase price in full. The company and the other purchasers later selected the chairs to fill their contracts, leaving only enough in the warehouse to fill Cohen's order. The company became bankrupt and Cohen brings replevin for the chairs, claiming an appropriation by exhaustion.

Goodman, for Plaintiff.

Groff, for Defendant.

OPINION OF THE COURT

Howley, J. The main question at issue is whether or not the creditors of the vendor may treat the above sale as void, thus defeating an action of replevin.

In order to declaare such sale void the counsel for the defendant relies, inter alia, upon Section 26 of the Uniform Sales Act as adopted by Pennsylvania in the Act of May 19, 1915, P. L. 543. This section informs us that "Where a person, having sold goods, continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact, or is deemed fraudulent under any rule of law, a creditor or creditors may treat the sale as void."

In other words, such a sale must be fraudulent per se, or, by the particular rules of law in the state, it must be deemed fraudulent; as ably pointed out by counsel for plaintiff, in such cases the old law, prior to the passage of the act and the doctrines propounded since its passage, governs.

From the facts, we cannot treat this sale as fraudulent per se; and in order to ascertain whether or not it is to be fraudulent under any rule of Pennsylvania law we must refer to the decisions of the Pennsylvania courts.

In our search for precedent we find the case of Clow v. Woods, 5 S. & R. 275, which sets forth a general rule that "if a buyer pays the price without taking possession of the goods, he takes the risk of the integrity and insolvency of his vendor." This rule is affirmed in the case of Babb v. Clemson, 10 S. & R. 419. This seems to be the leading case. Since its decision it was cited and affirmed in the case of Stephen v. Gifford, 137 Pa. 219.

Later there seems to be a softening of the strict rule laid down in the Clow case, supra, in the case of Keystone Watch Co. v. The Bank, 194 Pa. 535, and also in the case of White v. Gunn, 205 Pa. 229, which consider the hardships of such a stringent rule in certain business transactions. In the Keystone Case, supra, the court held that "actual transfer of possession is no longer necessary to effect a valid sale, for the courts will always consider the nature of the transaction, the relation of the parties and the object of the sale, in determining the sufficiency of a constructive or symbolic delivery."

There is a good discussion of the rule in the case of Riggs v. Bair, 214 Pa. 402, and most of the above cited cases are referred to therein. It stands for the proposition that "the rule of law, that a sale of personal property, without a delivery to the vendee, is a fraud against creditors, is still the prevailing rule in Pennsylvania, with the modification that in particular cases the law has been reformed to meet the changed requirement of business." Thus the rule of Clow v. Woods, supra, has been modified because of business requirements. The Keystone case, supra, is not on all fours with our present case, since the goods were held by an agent of the company, and there was a question of bailment and not of sale, the bailment necessitated a possession by the bailee, and such possession therefore was not deemed fraudulent.

Th Riggs case, supra, differs from our present case in that the goods sold were placed in a separate pile with the vendee's name and address attached thereto, and left there for convenience sake, as was the custom of the trade. A similar state of facts is to be found in the case of Rucker v. Spicer, 269 Pa. 451 and may be likewise distinguished.

In the case of Enterprise W. Paper Co. v. Rantoul Co., 260 Pa. 540, the court held that unless there was actual delivery of the goods, said goods on the Paper Company's premises, are liable to seizure by execution creditors of the corporation, for the law will not permit any devise to elude the principle which forbids a lien on chattels or a security separate from their possession.

Thus we have the principle that if a buyer pays the price without taking possession of his goods, he takes the risk of the integrity and solvency of his vendor, with possible exceptions and modification of business usages.

In the case before us for consideration, wherein has the plaintiff done anything to circumvent this strict rule? No business usages or customs have been stressed to change the rule. By his nonfeasance the goods were permitted to remain on defendant's premises. The other two purchasers found time, and were diligent enough to remove their chairs. Plaintiff did nothing to overcome the pre-

sumption of fraud, and it is therefore the opinion of the court that this retention of the goods by the vendor after the sale had been made, was, under the law of Pennsylvania, fraudulent as to the creditors of the company, and hence the action of replevin will not lie.

Judgment for the defendant.

OPINION OF SUPREME COURT

The first question that must be answered before the discussion of the learned court below becomes relevant is whether there was such an appropriation to the contract as would pass title to the purchaser. The court below has failed to treat this question and its failure to do so is inexplicable in the light of the given facts and of plaintiff's argument. Unless title has passed, the second discussion is entirely irrelevant for title remains in the Chair Co. and replevin will not lie.

Was there an appropriation to the contract with the assent of the buyer? There has been no express assent. But Cohen paid the price in full in advance. Surely this is sufficient evidence of implied assent to the appropriation in the absence of any other evidence. But was there an appropriation by exhaustion? We think there was. What more could the seller do to ascertain the goods? Would he have to move them, label them or do some other specific act? There remained no chairs but the ones needed to fill Cohen's contract. Surely reason dictates that this was an unconditional appropriation. We know of no argument or policy to constrain us to the opposite holding. See Valentine v. Brown, 18 Pickering (Mass.) 549 and Wait James v. Misland Bk., (1926) 31 Com. Cas. 172 (Eng.). Title therefore passed to the buyer.

But may the retention of possession of the goods by the seller be treated by the creditors as fraudulent and void? Undoubtedly it could be so treated. The strict rule of Clow v. Woods, 5 S. & R. 275 has been relaxed but not to the extent claimed by the plaintiff. There must be some act evidencing an intention to pass possession as well as title followed by some acts of the purchaser evidencing ownership. Dunham, Inc. v. Van Orsdale, 82 Super. 72 Hunter Const. Co. v. Lyms, 233 Pa. 561, and Northrop v. Finn Const. Co., 260 Pa. 15. Where the vendor continues to all appearances to occupy the same relation to the property as he did before the attempted transfer, it is void as to creditors.

Bankruptcy has intervened here. What title does the trustee get? Does he take it under these circumstances free of the claim of the purchaser? Sec. 70 of the Bankruptcy Act provides "The trustee shall be vested with the title of the brankrupt . . . (5) to any

property which prior to the filing of the petition . . . which might have been levied on and sold under judicial process against him." That in such a situation as this the trustee takes free of the claim of the purchaser, see In Re Irwin, 268 Fed. 162.

Neither title nor right to possession being in the plaintiff, the judgment must be for the defendant.

The judgment of the learned court below is affirmed.