COMMENTS ON RECENT DECISIONS.

THE POWER OF THE STATE OVER THE RIGHT OF CONTRACTING.

BY R. C. MCMURTRIE, ESQ.

(1) IN Commonwealth *v.* Biddle (139 Penn., 605), the question for decision was whether the making of a contract for insurance by the insured was, under the laws of Pennsylvania, punishable as a misdemeanor. The Court held that the statutes intended to punish the insurer and not the insured. It is not intended to criticise *the decision*, but there is a statement of the unanimous concurrence of the judges in a proposition that is of great importance, binding as it will probably be deemed on the lower courts. It is that "there is no doubt of the power of the legislature to make the insurance of his property in an unauthorized foreign company, by the owner, criminal, if done in this State."

This is premised by an analogous statement: "Beyond the limitations imposed by the Constitution, the power of the legislature to declare any acts done within the territory of the State unlawful or criminal cannot be questioned."

There is a prior reference to the Constitution of the United States as restraining the power of the State to interfere with the liability to enforcement of contracts that makes the reference to the restraining power of the Constitution (in the singular) significant. It would seem to imply that the Constitution of the United States has no further intention than to inhibit an interference with the obligation and the liability to perform the contract.

It is probable that this view is correct. It is reasonably clear, however, that the obligations of contracts are interfered with and impaired most materially if the person who makes them can be punished as a criminal.

On the other hand, it seems also quite clear that, if by the law of the place where the contract is made it is criminal, there can be no obligation.[1] It would be a singular combination of ideas if the result is that the Constitution of the United States has the effect of overruling the power of a State to prohibit a contract, leaving it as a binding contract, but not affecting the illegality and criminality of it. It will probably be found that the clause against impairing the obligation of contracts in the Constitution of the United States has no bearing on what is a contract; that all depends on the law of the place where it was made. It may be certainly affirmed that the clause was not intended to have any effect saving to prohibit legislation after a valid contract made.

[1] It may be said that this particular contract is excluded from this general rule by the fact that the illegality arises solely from the revenue law, and no foreign State will pay any attention to such rules.

(2) The first point mentioned becomes of infinite importance looking to the tendency of what is known as the protective policy. If the community could once be made aware that they could make it criminal to buy or use anything produced within the States, though they cannot prevent the importation nor impose a duty, it will be singularly inconsistent with protection principles if we do not find that the commerce clause alone protects us from being made liable to fine and imprisonment for consuming Chicago beef and Minneapolis flour. They are already authoritatively informed that if they can make the assertion that these things are unwholesome, the Court must swallow—not the beef, but the assertion, for this is an exercise of the police power and is not traversable.

The probability is, however, that no legislation will stand that is aimed directly or indirectly at the freedom secured by the commerce clause of the Constitution of the United States.

(3) The great point, therefore, is how far does this commerce clause, and the clause securing the rights of citizens of a State to the citizens of another State, protect us from punishment for contracting without considering the nationality and residence of the other party? When the contracts relate to tangible property that is to be moved from one State to another, there would be no difficulty. That is commerce in its most evident form; and if a tax cannot be laid, we may depend upon it we cannot be imprisoned for the transaction. Nor is it likely to follow that the protection will be withdrawn when the act of importing terminates. A statute professedly aimed at interstate or foreign commerce, as one must be that imposes fine or imprisonment for possessing or using an imported article, certainly interferes much more with commerce than a tax on the business of an importer.

(4) But there is the vast field of contracts, out of which nothing in the form of tangible commerce comes. The instance in Biddle's case is an illustration—a contract to indemnify against fire.

In Paul *v.* Virginia, a phrase was used by Mr. Justice FIELD, probably true as applied to that case, namely, "*Insurance is not commerce*"—that is, an agency of a foreign corporation to deliver policies is not commerce in the sense that this business could not be taxed by a State. But if this means that a resident in a State cannot contract with a foreign corporation to insure him without coming under the penalty of fine and imprisonment, within what narrow limits are we secure in the right of intercourse with citizens of other States?

(5) There can be no doubt, as Judge MITCHELL has observed, of the power of the State to punish any one within its borders as it sees fit, saving as it is restrained; nor will any one dispute that the Constitution of the United States is as efficient as that of the States. There may be a dispute as to whether a prohibition to impair a contract includes a prohibition to punish for making it, or as to the effect of the commerce clause. But the probability is that the citizen will find that the authoritative exposition will be that no legislation can be enforced that aims directly at trammelling intercourse of any kind between citizens of one State and those of another, and with foreigners because they are such, and directly aims at spoiling for us the home market.

(6) It would be a funny spectacle, certainly, if the result of the *fracas* is that a citizen may make the contract by mailing his letter in Camden, while if he mails it on this side of the Delaware he is a criminal. This would be as absurd as if he could be compelled to perform the contract and sent to jail for making it by the same judge.

NOTE.

The case mentioned by Mr. McMurtrie was finally determined after reargument, on February 2, 1891. In 1873, the Legislature of Pennsylvania made it a misdemeanor, punishable by a fine of five hundred dollars for each offence, for "any person, or persons, or corporation receiving premiums or forwarding applications, or in any other way transacting business for any insurance company or association not of the State," without a license under the insurance laws (P. L. [1873], 27.

In 1887, the legislature amended the section so as to impose two classes of penalties: one of five hundred dollars on every foreign association or corporation not of the State doing business within the State, for each month or fraction thereof during which the business was carried on; and another fine of one hundred dollars on "any person or persons, or any agent, officer, or member of any corporation paying, or receiving, or forwarding any premiums, applications for insurance, etc." (P. L. [1887], 62).

The defendant, Biddle, in 1887, after the foregoing amendment became law, received a notice from the Cotton and Woollen Manufacturers' Insurance Company of New England, not authorized to do business in Pennsylvania under the insurance laws of the State, that a policy on his mill in the company, which he had taken out in 1886, was about to expire, and that the same would be renewed, in pursuance of the by-laws of the company, unless the defendant signified his desire to the contrary. The defendant sent no reply, and thereafter received a renewal of his policy, for which he sent his check. For thus renewing his insurance he was convicted and fined one hundred dollars in the county court, the Court holding that the amendment of 1887 made it a crime for a citizen of Pennsylvania, resident in the State, to insure his property in the State in an insurance company not authorized to do business under the laws of Pennsylvania. The Supreme Court reversed this decision, and held that the amendment in question only applied to those who, as agents of unauthorized companies, sought to place insurances, and did not apply to one who, as in the case of Biddle, sought to obtain insurance on his own property.

At the same time, the Court, through Mr. Justice MITCHELL, intimated that the legislature of a State could make the "insurance of his property in an unauthorized foreign company, by the owner, criminal, if done in this State." But he adds: "Such a statute would be not only unusual, but a very harsh and extreme interference in the general right of a citizen to manage his private affairs in his own way, and we should not attribute such an intent to the act in question unless its terms be plain or the implication unavoidable" (p. 609).—*W. D. L.*