Goods (bona addicuntur) are ad-judicated to the ad-judicatee at judicial sales under the French and Louisiana law.[1]

E. T. MERRICK.

New Orleans, La.

EDITORIAL NOTES.

BY G. W. P.

The case of O'Neil *v.* The State of Vermont, which is criticized by a correspondent in this number of THE AMERICAN LAW REGISTER AND REVIEW, is a decision of great interest and importance. Many vital questions of constitutional law are discussed more or less elaborately by Mr. Justice BLATCHFORD, who delivers the opinion of the majority, by Mr. Justice FIELD, who files a dissenting opinion, and by Mr. Justice HARLAN, in whose separate dissenting opinion Mr. Justice BREWER concurs. But perhaps no aspect of the case is more interesting than that which it presents when considered as a decision relating to the Federal power over interstate commerce. An examination of the opinions reveals the fact that the Court is divided upon a comparatively simple question belonging to this all-important branch of our constitutional law; and it seems impossible to escape the conclusion that the tribunal which had but a short time ago settled this doctrine upon a satisfactory basis is once more at sea in regard to it, the views of the individual justices being well-nigh hopelessly at variance with one another.

[1] See Savigny, Vol. 6, Berlin Ed., 1847, p. 257, Sec. 280; also 4th Vol., p. 532. Merlin Reportoire verbis "adjudicataire et adjudication," also verbis "Chose jugée;" Mackledey, Brussels Ed., 1846, pp. 239 and 240, Partie Speciale Sec., 505. See the accurate definitions in Burrill's Law Dictionary of adjudicatio and adjudication. See Res judicata, Chapter 2, pp. 5 to 11 of Bigelow on Estoppel.

The profession began to suspect the existence of this state of affairs when the decision in Maine *v.* The Grand Trunk Railway was handed down, a decision which was commented upon in the March number of this periodical. The suspicion received confirmation when the Court decided Ficklen *v.* The Shelby Taxing District, which Mr. FRANCIS COPE HARTSHORNE criticized in a contribution to the July number. At the conclusion of his remarks Mr. HARTSHORNE used this language: "There is much food for reflection in the thought suggested by the decisions of the Court for the last year, namely, how great a revolution of doctrine may result from a few changes in *personnel.*" And now comes the case of O'Neil *v.* The State of Vermont, which substitutes certainty for suspicion on this point, and enables us to quote Mr. Justice FIELD in support of the view suggested by Mr. HARTSHORNE in the foregoing quotation. Says the learned Justice in his dissenting opinion: "When Bowman *v.* Chicago, etc., Ry. Co. was decided, Justices MATTHEWS, MILLER and BRADLEY were members of this Court and concurred in the decision. And when Leisy *v.* Hardin was decided the latter two justices were still members and concurred in that decision. These justices were distinguished for their ability and learning, and it was the occasion of great pride to them that they had contributed by their labors to establish that freedom of interstate commerce from State interference which made the different States, commercially, one country. * * * * * These three justices are no longer members of this Court, but since they ceased to be members there has been no adjudication by it until the decision in this case, which, in any respect, changes its previous decisions upon the exclusive power of Congress over interstate commerce." Although we do not agree with the learned Justice, that this is the first case which marks a departure from sound doctrine, we cannot but acquiesce when he intimates that in the decision of questions of interstate commerce the country is already beginning to feel the loss of those great jurists, Mr. Justice MILLER and Mr. Justice BRADLEY. In the case under dis-

cussion it is not so much the decision upon the question of interstate commerce that excites surprise (leaving the other points of the case out of consideration), as it is the mode of approaching the problem and the manner in which its solution is attempted in the majority opinion.

A citizen of New York was engaged in the retail liquor business, which was and is a lawful occupation under the laws of that State, and his commodities were legitimate subjects of commerce. In the ordinary course of business he received from the citizens of another State orders by mail, telegraph, and express for small quantities of these commodities accompanied (in the case of express orders) by receptacles for the liquor, upon which the freight charges were prepaid by the customers. These orders were executed, the receptacles were filled but in no way disguised, and were then shipped through the same express carrier back to the customers, the dealer taking the usual precaution, as the customers were unknown to him, of sending the commodities C. O. D. It turned out that the State into which the goods were thus sent—Vermont—had enacted a law making it penal, except in certain cases which do not affect the present question, to "manufacture, sell, furnish, or give away . . . . . spirituous or intoxicating liquor,"—under which description the above-mentioned subjects of commerce fell. The New York dealer was arrested under this statute, in consequence of an affidavit of complaint made before a Vermont justice of the peace. The patent defects in this document are ably discussed by our correspondent. Before the justice of the peace he was convicted and sentenced to pay a fine of over $9,000 with about $500 costs, and to be imprisoned for one month—the imprisonment to be prolonged, in the event of non-payment of the required sums within the month, for a period of seventy-nine years. A jury on appeal subsequently reduced the number of offences, so that the sentence of the County Court was for the insignificant fine of $6,000 and, in default as above, for the trifling term of fifty-four years. On appeal

the Supreme Court of Vermont affirmed the judgment below.

Leaving aside the questions as to whether this was a humane and usual or a cruel and unusual punishment, and whether or not the proceedings under the Vermont statute amounted to "due process of law," it will be profitable to mark the ultimate fate of the contention made on behalf of the convicted dealer before the Supreme Court of Vermont, that the Vermont statute if applicable to this case was an infringement upon the exclusive right of Congress to regulate interstate commerce. That tribunal considered the question whether the title to the subjects of commerce passed to the purchaser before transit began or when they were delived by the carrier in Vermont. The Court decided that "there was a completed executory *contract* of sale in New York, but the completed *sale* was, or was to be, in this State." The opinion then proceeded: "Concerning the claim that Section 8 of the Federal Constitution, conferring upon Congress the exclusive right to regulate commerce among the States, has application, *it is sufficient to say that no regulation of, or interference with, interstate commerce is attempted.*[1] This is a form of argument only too often found in the utterances of courts of last resort or of disputants whose opponents have no opportunity of replying to them. Although the thought is not expressed in so many words, we seem to feel that the Vermont Court had in mind some such idea as that a transaction which was consummated in Vermont could not be an interstate commerce transaction; and that the constitutional provision would have had application only in case the sale had been completed in New York. Groundless as such a view is, it constitutes the only

[1] Mr. Justice BLATCHFORD, in delivering the opinion of the majority, contends that this clause was intended by the Vermont Court to be applicable only to two seizure cases arising out of the same transaction and decided at the same time. It is at least doubtful whether such was the meaning of the Vermont Court. If it was, then that Court decided against O'Neil's contention that the act was a regulation of commerce without even attempting to justify so remarkable a decision.

trace of a reason to be found in the opinion for the conclusion which we have italicized above.

When the cause reached the Supreme Court of the United States, it was assigned as error, *inter alia*, that the Vermont Court had not held the statute void as in conflict with the Commerce Clause. But a majority of that tribunal decided that "the only question considered by the Supreme Court, in its opinion, in regard to the present case, was whether the liquor in question was sold by O'Neil at Rutland or at Whitehall, so as to fall within or without the statute of Vermont, and the Court arrived at the conclusion that the completed sale was in Vermont. That does not involve any Federal question." Accordingly the writ of error was dismissed for want of jurisdiction. Mr. Justice FIELD, in his powerful opinion, demonstrates the unsoundness of this position, when, after referring to the language of the majority opinion just quoted, he says, "To this I answer, that before the State Court could reach the question whether the sale fell under the law of Vermont, it had to determine whether the sale was completed in that State or in New York—whether, therefore, an executory sale of goods in New York, completed in Vermont, was or was not a transaction of interstate commerce, and until that question, which was a Federal one, was disposed of, the alleged State question could not be considered. But that the commercial question was brought to the attention of the Supreme Court of Vermont, was argued by counsel there and passed upon by that court, does not rest as an inference from the facts necessarily involved: it appears from its opinion and the official report of the case." The Federal question being thus before the Court, that tribunal has no right, he contends, to refuse to decide it, and, moreover, he urges that the decision, when rendered, should be adverse to the constitutionality of the Vermont statute. The transaction under consideration embodies "all the elements which constitute interstate commerce." "As said by this Court in Welton *v.* State of Missouri,[1] commerce 'comprehends intercourse for the pur-

[1] 91 U. S., 275, 280.

poses of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens or subjects of other countries and between the citizens of different States.'"

Mr. Justice HARLAN, with whom concurred Mr. Justice BREWER, agreed with Mr. Justice FIELD that a Federal question was necessarily before the Court and used the following language: "The decision that the sales were consummated in Vermont, and consequently that the defendant violated the laws of that State in doing what he did there, by his agents, is not in itself sufficient to support the judgment, except upon the theory that he had no right, under the Constitution of the United States, to send the liquors into Vermont to be there delivered in the original packages." These Justices were, however, of opinion that the sales in question "were not in any fair sense transactions of interstate commerce protected by the Constitution of the United States against the laws of Vermont" . . . "What he (the defendant) did was a mere device to evade the statutes enacted by Vermont. . . . The doctrine relating to 'original packages' of merchandise sent from one State to another State does not embrace a business of that character." This would seem to be a dangerous view of the case. Aside from the fact that there was nothing on the record to show that the defendant even knew of the existence of the foreign statute, it is to be remarked that the law will be deprived of all certainty if the Court undertakes to scrutinize in each transaction the *motives* which induced the person who claims the protection of the Commerce Clause to engage in interstate business. Such a doctrine could be applied, should the Court feel so inclined, to transactions involving any of the various branches of commerce, and there would be no assurance in a given case that the Court would not be pleased to consider that the complainant did what he did merely to "evade" the State legislation. The view of Mr. Justice FIELD is a satisfactory answer to this contention. "Nor can it make any

difference," he says, "what motives may be imputed to the parties on the one side in selling, and on the other in purchasing the goods; the only inquiry which can be considered is, were the goods bought and sold subjects of lawful commerce, for if so they were, in their transportation between the parties — citizens of different States—until their delivery to the purchaser or consignee in the completion of the contracts of sale, under the protection of the commercial power of Congress."

Such is the position of the Court on one of the points in this remarkable case. A cause comes before it necessarily involving, as it seems to us, a Federal question. The majority dismiss it for want of jurisdiction. Three judges are of opinion that the jurisdiction exists. Two of them would determine the question adversely to the appellant because they suspect that his motives have been bad. The other brings principle and authority to bear on the case and concludes that his brethren are overturning a well-settled and all important doctrine and depriving a citizen of the United States of the protection guaranteed by the Constitution.

In the meantime O'Neil has either paid the enormous fine or he has been thrown into prison for the rest of his natural life.