COMMENTS ON RECENT DECISIONS.

O'NEIL *v.* THE STATE OF VERMONT.

MR. EDITOR: The decision of the Supreme Court of the United States in the case of O'Neil *v.* The State of Vermont, rendered at the last term, excites an increasing interest as a knowledge of it extends among the busy members of the legal profession. It was the case of a prosecution and conviction in Vermont of a citizen of New York, for acts performed by him in the latter State, which were admittedly lawful there, but which would have been unlawful if committed in Vermont. Those acts were the selling of liquors at Whitehall, New York, to residents of Rutland, Vermont, upon orders received at Whitehall through an express company acting as the agent of the purchaser.

The decision of the Court was that the case had no business before it, and that it had no duty to perform except to dismiss it. Having thus denied its own right to decide any points involved in the case other than that of jurisdiction, it proceeds to discuss with great minuteness and to decide every point made on the appeal from the Supreme Court of Vermont.

O'Neil's counsel contended in his brief that as the sales in question were acts of interstate commerce no State statute could make them unlawful. The Supreme Court of Vermont, in discussing this point, dwelt upon the deplorable consequences that would follow if the power of Congress to regulate commerce between the States could be invoked to prevent a State from inflicting penalties for engaging in such commerce. Nevertheless the majority of the United States Supreme Court declared that this argument and decision thereon raised no federal question.

But this total subordination of the commerce powers of the Federal government to a State statute, contradicting as it does every previous decision of the Court on the subject, and setting at naught the mighty interest which was the primary cause of the formation of the Federal Constitution, is less startling than the attempted justification by the Supreme Court of the United States of a State statute which authorizes imprisonment for life by a Justice of the Peace, without trial by jury, upon a complaint which gives an alleged offender no information of the of the offences of which he is accused. This is a Russian method, and is without precedent or analogy in the judicial history of any English-speaking people.

The Vermont statute against selling intoxicating liquors provides that under an indefinite charge of one offense the defendant can be tried for an indefinite number of offenses. In the case under discussion the only charge made against John O'Neil was that "on the 25th day of December, 1882, he did at divers times sell, furnish and give away intoxicating liquor without authority." Under this charge, which describes no sale by naming the purchaser, he was convicted by the petty magistrate of 457 separate offences, which on appeal were reduced to 307, and he was

sentenced to pay $20 for each offence, with nearly $500 costs, making a total of about $6,600, and in default of payment thereof to be confined at hard labor at the rate of three days for each one dollar of the sum, making his term of imprisonment more than fifty-four years.

In commenting upon this extraordinary decision the *Albany Law Journal* of the 7th of May says:

"This monstrous perversion of justice presents a glaring contrast to the humane rule laid down by our Court of Appeals in the Tweed case, respecting cumulative sentences, which is that the punishment in one indictment shall not exceed the maximum pronounced for any one of the offences."

The Constitution of the United States forbids the infliction of cruel and unusual punishments, thus granting to every citizen an immunity from such punishment. The Fourteenth Amendment of the Constitution forbids the denial or abridgment of this immunity by the State of Vermont or any other State in the case of any citizen. It furthermore decrees that neither the State of Vermont nor any other State shall deprive any person of life, liberty or property without due process of law. It was the view of Justice FIELD, as expressed in his dissenting opinion in the present case, that in criminal proceedings there can be no due process of law where the accused is not informed of the nature and cause of the accusation against him. He quoted Chief Justice GIBSON of the Supreme Court of Pennsylvania upon this point as follows:

"Precision in the description of the offence is of the last importance to the accused, for it is that which marks the limits of the accusation and fixes the proof of it."

I have not addressed you this communication to add anything of my own to the utterances of these great men. I have written it solely for the purpose of giving your readers the benefit of some observations hitherto unpublished on this O'Neil case, written by the most distinguished writer on Criminal Law in the United States, and one whose textbooks are often quoted as high authority in the Supreme Court of the United States, as well as in the courts of the several States. I refer to JOEL P. BISHOP, the author of "Bishop's Criminal Law" and "Bishop's Criminal Procedure." In this paper, written for private perusal only, and from which I am permitted to quote, he says:

"The foundation of the cause was laid in the court of a Justice of the Peace, an inferior magistrate having, by the universal legal understanding in all countries where our system of law prevails, authority only in small matters, and sitting in Vermont without the aid of a jury. If there was any defect in the jurisdiction of this magistrate it was not cured by an appeal to the County Court, or the further carrying of the questions of law to the Supreme Court of the State.

"The Fourteenth Amendment of the Constitution of the United States declares that the State of Vermont shall not 'deprive any person of life, liberty or property without due process of law.' It is plain to my mind that this proceeding before this inferior Vermont magistrate was not 'due process of law' on which to strip a man of his property and send him to perpetual imprisonment, according to any opinion ever ex-

pressed by any competent legal person. So that the Fourteenth Amendment utterly took from the magistrate jurisdiction over the cause, and jurisdiction, by universal legal practice, when it is of this sort, is a point never waived; it is the foundation of every suit, and any judgment without it is void. The case then was this:

"By force of the Constitution of the United States, the Vermont record appeared before the United States Supreme Court as rendered without jurisdiction; it was the constitutional duty of that Court to declare it so. The Constitution of the United States was the highest law for that Court as well as for the people; and even if there had been, as there was not, an Act of Congress forbidding the taking of that point when it was not raised before the Vermont magistrate or before the Federal Supreme Court, the Act would have been void; the question having come before the latter tribunal in due course the Constitution, which was the highest voice, commanded it to reverse the judgment.

"But was the Vermont magistrate deprived of jurisdiction on the ground that his proceeding was not "due process of law?" The complaint or information before him charged but a single offense, and set out this offense only imperfectly. If it had been for this offense, punishable as it was by a small fine and slight imprisonment, that the defendant was put upon his trial, I do not see that the proceeding before the magistrate might not have been deemed "due process of law," but in fact he was made to stand his trial, not for this one offense, but for an infinite conglomeration of offenses, though the magistrate found him guilty of only 457, and the jury, on appeal, of only 307. But the jurisdiction which the magistrate assumed, and which was affirmed by the County Court, and subsequently by the Supreme Court of the State, was to try the party for infinite offenses, to take from him more property than any mortal on earth ever owned, and to imprison him for more years than any man ever lived. Not only was this jurisdiction assumed by a magistrate universally held to be inferior, but by one equally so under the general laws of Vermont, one who had there no authority thus to fine and imprison a man for any of the non-capital felonies, but whose exceptional power extended only to one class of inferior offenses. Beyond this, the jurisdiction assumed was to try the defendant as to all these infinite offenses, but one, utterly without allegation. It is a mockery to ask any lawyer or any other man, who knows anything of our legal history or procedure, if this is "due process of law." Even if it was competent for Vermont to try all crimes in this way, it was plainly not competent to discriminate thus against an inferior offender, and give a jurisdiction to inflict the highest penalty known to laws, short of death, to a magistrate sitting without a jury, when the general laws of the State pronounced incompetent to inflict such or even a greatly less punishment.

"Let us now assume that I am wrong in deeming the information before the magistrate to charge only one offense, and that it in fact charged infinite offenses. We may admit that this is what the Vermont statutes undertook to make it. If it is, then it is not "due process of law" in Vermont. But I am here answered by the assertion that the Supreme Cou of Vermont has the exclusive jurisdiction to settle this

question of the effect of the Vermont Constitution, and it has settled it adversely to what I thus claimed. My reply is that while this may have been so before the adoption of our Fourteenth Amendment, it is not so now. By settled doctrine in the United States Supreme Court, it is for that Court to decide as supreme law whether or not its tribunal has violated the Constitution of the United States.

"The tribunal takes judicial cognizance of all the written laws of a State and of the fact that the Constitution of a State is its highest law over-riding its statutes. It knows and admits that a State process violative of a State Constitution is not "due process of law" in the State. And its jurisdiction under the Fourteenth Amendment to determine what is "due process of law" in the State of Vermont carries with it the authority to construe the Vermont Constitution. I see no escape from this conclusion.

"But assuming this reasoning not to be correct, and still assuming that the information before the Vermont magistrate charged infinite offenses, I confidently assert that the allegation of infinite offenses, the quantum of wrong with which the defendant is accused being thus without any limit, is not an allegation of any one offense, nor of any 307 offenses, nor of any 457 offenses; therefore, that to put a man on his trial upon such an allegation is to try him without averment, which everyone admits to be without due process of law.

"I admit that I am without authority for this construction of the allegation of infinite offenses. And the reason why I have no authority is that this Vermont idea is absolutely original and unique; no right thinking person ever before deemed such an allegation permissible or even attempted to make it. *So that this is the first opportunity for its construction which ever arose.* But reason declares that to charge a man with everything is to charge him with no one thing in particular, and the averment which justifies the putting of a man on his defense is that of a particular act, not of infinite acts in general.

"Here again I am told that this is a question for the Vermont Court, and not for the Supreme Court of the United States. And this is equivalent to my being told that the Fourteenth Amendment of our Constitution is a nullity. For on the assumption that this question is for the Vermont Court, and that the Federal Supreme Court has no power of review over it, the clause under consideration in the Fourteenth Amendment is interpreted down to read as follows: 'Nor shall any State deprive any person of life, liberty or property without some process of law which, on the question being carried before the highest Court of the State, shall not be pronounced by such Court unconstitutional or otherwise void.'

"It requires no argument to show that a clause in our National Constitution in these terms would be a practical nullity, or that a decision giving to any provision this interpretation would be an attempt to strike it out of the Constitution. I do not believe that there is a member of the Supreme Court who, on due reflection, would rule any case in this way. I know there was something a little like this said in the 'Opinion of the Court' in Hurtando *v.* People, 110 U. S., 516, 532. But I do not understand even that *dictum* as going so far; if it did it is plain that no bench

of judges can thus travel out of the record before them, and by an assertion written by a single judge overturn and banish from our Constitution any provision therein—even an amendment.

"Again, let us assume that the information before the Vermont magistrate did charge all the offences whereof the party was found guilty. Still by the universal understanding in all countries wherein our system of laws prevails, and by the universal understanding in Vermont as to everything else except liquor selling, it is not due process of law to fine a man even the lower sum of $6,140 with $497.96 costs, and commit him to imprisonment at hard labor even for the lower period of fifty-four years, on this trial and sentence before a Justice of the Peace, sitting without a jury. If the Fourteenth Amendment of our Constitution does not prohibit this, and render the proceeding void for want of jurisdiction, that amendment, I need not repeat, was made in vain."

I think the legal profession need only be informed concerning this upholding, by a majority of the Supreme Court of the United States, of the despotic statute of Vermont, and the outrage committed under its authority, to arouse them to a realization of the dangers which confront the liberties of citizens, imperilled as they are by the revolutionary ideas promulgated by the highest judical tribunal in the land. Public opinion based upon correct information and right reasoning in time reverses unjust decisions, as it changes imperfect constitutions and obliterates obnoxious laws.

It may be very desirable to prevent a New York liquor vender from selling liquor to Vermont tipplers, but it is much more important to maintain the ancient liberties of the people, and protect every citizen from the exercise, by a petty magistrate, of the arbitrary power which exists nowhere outside of Russia and Vermont, and in the former sends a subject to death by slow torture in Siberia, without a hearing, and in the latter dooms a citizen to imprisonment for life on the heinous charge of selling liquors "at divers times" on a given day without further specification.

It is to be hoped that Mr. BISHOP will place his views in a permanent form in a future edition of his work on criminal proceedings.

SENTINEL.