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IS THE SEVENTEENTH ARTICLE OF THE CONSTITUTION OF PENNSYLVANIA SELF-ENFORCING? In our last issue we stated in a note under this title that "A bill in equity was filed in the Dauphin County Court of Common Pleas by the Harrisburg Rolling Mill Company against the Pennsylvania Railroad Company, because of a breach of one of the sections of the article in question. Judge Simonton, in his opinion, declared this article to be self-enforcing; that regardless of the lack of legislation in conformity with the twelfth section, nevertheless a breach of any provision of the first eleven sections will of itself be sufficient cause for the courts to lay hold of the offending corporation."

The above statement was more sweeping than the facts of the case referred to warranted. The suit was brought for a breach of the last clause of section three of the seventeenth article, which ordains that "persons and property transported over any railroad shall be delivered at any station at charges not exceeding the charges for transportation of persons and property of the same class in the same direction to any more distant point." Judge Simonton's decision was that this clause needed no legislation to enforce it. The decision, we feel, is a good one, and hope that the principle may in time be applied to all the sections of the article.

UNAUTHORIZED RAILWAY LEASES: CENTRAL TRANSPORTATION COMPANY V. PULLMAN'S PALACE CAR COMPANY. The Circuit Court of the United States, sitting in the Eastern District of

Pennsylvania, has recently dismissed the exceptions filed by both parties to the report of the Master, Theodore M. Etting, Esq., to whom the court had confided the duty of ascertaining the amount of compensation due by the Pullman's Palace Car Company to the Central Transportation Company for the use and enjoyment of property under an unauthorized lease. It will be remembered that the Central Transportation Company, a corporation chartered under the "manufacturing corporation law" of Pennsylvania, made a lease of its cars, contracts and patent rights to the Pullman's Palace Car Company on February 17, 1870. The lessee entered into possession of the property and used it for many years, paying a large annual rental to the lessor. The lessee, however, refused to pay the rental due for the first two quarters of the year 1885, and an action of covenant was begun in the Circuit Court for the purpose of recovering the arrearage. In this action, the objection that the contract sued on was *ultra vires* was not pleaded. The plaintiff obtained a verdict, but on appeal to the Supreme Court, the judgment of the court below was reversed on account of the erroneous exclusion of certain evidence affecting the amount which the plaintiff by the terms of the original lease was entitled to recover: 139 U. S. 62. While this suit was pending, another action of covenant had been instituted to recover rental for the year ending July 1, 1886. In this suit, the defendant pleaded (*inter alia*) that the indenture of lease was void in law for want of authority and corporate power to make and enter into it. No question was raised as to the power of the lessee to accept the lease, but it was urged that the Act of the Pennsylvania Legislature of February 9, 1870, prepared by counsel for the purpose of authorizing the lease in question, and passed by the Legislature with that end in view, was in law an insufficient warrant to the plaintiff to divest itself of the means of performing its "public duties." In order to support the averment that it had public duties to perform, recourse was had to the argument that the plaintiff, though originally chartered under the general law, as was the case with thousands of other corporations in Pennsylvania, had become a *quasi*-public corporation in virtue of the Act which assumed to confer upon it authority to make the lease in suit, extended the term of its corporate existence and authorized an increase of its capital stock. The contention was then made that as the corporation was a *quasi*-public corporation, and as the authority to lease was insufficient, the contract was to be treated as void, and recovery upon it must be denied. The court below sustained the defendant's contention, and, on appeal to the Supreme Court, the judgment of the court below was affirmed, Mr. Justice Gray delivering the opinion: 139 U. S. 24.

While the second suit was pending, the Pullman's Palace Car Company filed in the Circuit Court a bill to enjoin the further prosecution of the action on the ground: (1) that under an agreement between the parties, the lessee had become entitled to sur-

render the lease; (2) that the property covered by the lease had become so mingled and identified with the lessee's business that it was impossible to restore the cars and equipment, and to re-assign the contracts, and that equitable relief was needed to determine the amount of compensation due; (3) that the lease was invalid, and that, therefore, there was no liability upon the part of the lessee except to return the property capable of return, and to make compensation for its use. The court refused to interfere, however, on the ground that the legality of the lease could be tried as well at law as in equity. The decision of the court upon this point seems to have been unquestionably correct. The validity of a corporate contract is eminently a question for a court of law to pass upon. It is interesting to observe that in *Beman* v. *Rufford*, 1 Simons, N. S. 550 (1851), Lord Cranworth, sitting in equity, refused to pass upon the validity of an unauthorized railway lease, and he merely granted an *interim* injunction, directing that a case be stated for the opinion of a court of law upon the point.

After the decision in the Supreme Court, the Pullman's Company moved for leave to discontinue the suit in equity, while the defendant moved for leave to file a cross-bill for a return of the property, or for compensation. The former motion was refused, and the latter was granted. The cross-bill was filed, and the right of the lessor to affirmative relief was vindicated by the court. "The following propositions respecting such contracts," said Butler, J., "may be affirmed with confidence: First, that the courts will not enforce them; second, that the courts will not interfere for the relief of either party when they are executed; third, that the courts will interfere to compel restitution of property received under such a contract by one who repudiates it—except when the contract involves moral turpitude." This contract involved no moral turpitude. Both parties acted in good faith upon the belief that the contract was lawful. It was the case of a difference of opinion between court and counsel. The right to restitution was admitted in the original bill—but independently of the admission was to be treated as established upon the basis of many authorities, among which the court laid special emphasis on *Thomas* v. *Richmond*, 12 Wall. 349 (1880), and *Spring Company* v. *Knowlton*, 103 U. S. 49 (1870). The Pullman's Company cannot be heard to assert that this lease was to the disadvantage of the public, and the lessor is entitled to recover back property parted with under it. "It would be difficult to state a case more completely within the principle invoked than the one before us. . . . The property must, therefore, be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the plaintiff, and cannot be separated. Compensation must, therefore, be made. What, then, is the measure of compensation? Clearly, we think, the value of the property when received, together with its earnings since, less the amount paid as rent:" 65 Fed. Rep. 158.

In applying the principle of compensation as above laid down, the Master has considered several measures of value with respect to the property transferred under the lease, "none of which can be said to be absolutely accurate, but all of which serve to check or verify each other." He has placed most weight upon the earning capacity of the plant at the time of the lease, and, as a test of this capacity, he has accepted the average market value of the capital stock at the time of the transfer. The lessor before being charged with rent received, however, was entitled to a credit under the opinion of the court. for the earnings of the property. The Master had found that an accurate ascertainment of the earnings without further evidence than that which was produced before him was impossible—and upon this point suggested that further testimony be taken. The court, however, seems to have cut the Gordian knot by making a decree for the payment of the value of the property when transferred with interest thereon to date—less the amount paid as rental.

When the litigation ends, it will be interesting to compare the final result with the result that would have been reached had a recovery been permitted in the first instance upon the contract. Since these long leases are in effect sales, and since at their expiration nothing is expected to be left of the demised property, such a decree as the one just entered will make *ultra vires* leases profitable for the lessors in every case where the sum of rentals for the unexpired term is less than the estimated value of the property. This result cannot long stand unchallenged. At present, it must suffice to venture the suggestion that the learned opinion of the Circuit Court has not made the preliminary question of the lessor's right to affirmative relief entirely clear. Certainly *Spring Company* v. *Knowlton*, *supra*, is not in point, for in that case the party seeking relief was the party who had elected to disaffirm the invalid contract. Thomas *v.* Richmond. *supra*, is not an authority in favor of the lessor's right. In that case, both parties made a contract in violation of a statutory prohibition, and found themselves in consequence *in pari delicto*. The statute was passed to emphasize a theory of public expediency. The contract was, in no sense, an immoral contract. The plaintiff's right to recover in *quasi*-contract was denied. It is submitted that if the lease in the present case had been a contract between individuals, and had been void as against public policy, the lessor would not have been entitled to affirmative relief. The result reached by the court, therefore, involves a decision that corporations stand upon a different footing from individuals in this respect. If this is so, must it not be conceded that the conclusion reached by the Circuit Court (however sound it may be) is without support from the authorities cited by Judge Butler or from any other authorities to be found in the books? See *Recent Development of Corporation Law in the Supreme Court of the United States*, 34 AMERICAN LAW REG. & REV., N. S. 296.

MECHANICS' LIENS. A recent case, *Bratton* v. *Ralph*, 42 N. E. 644 (1896), while voicing the position of the highest court of Indiana upon the liability of the land, upon which any building subject to a mechanic's lien has been destroyed, to satisfy the claims of the lienor, does not, in any sense, lessen the conflict which exists upon the question, or supply any means upon which a true rule may be evolved. In this case, a sub-contractor sought to foreclose a mechanic's lien upon the appellant's land for work done and materials furnished in plastering a house in process of erection thereon. Before its completion and before the notice of the lien was filed the building was destroyed by fire, and the question was presented to the court, whether the right to the lien was lost with the building or continued against the land. The statute which secured to mechanics the right to look to the building, upon which their labor and materials were directed, for their remuneration in this instance provided that "the entire land upon which any building, erection or other improvement is situated, including the portion not covered therewith, shall be subject to the lien:" Rev. St. 1894, § 7256: and the court allowed the lienor to foreclose his lien and obtain satisfaction from the land, after the building had been demolished, upon the ground that the general purpose of the legislature in passing the statute was to protect laborers and material-men, and the lien should, therefore, apply to the land directly, if a recovery from the building itself should become impossible.

As to the question here at issue, the authorities are at variance. Pennsylvania early led off with the holding that the lien was given largely because the land was benefited by the erection of the building, and the lien on the building was the principal thing, while that on the land was merely the incident, it being superadded by legislature because it was essential to a full enforcement of the lien against the building which had become attached to and part of the realty. Therefore, it was held, that with the destruction of the building the lien on the land was lost. This holding was also deemed more politic, as favoring future improvements. The Act of 1836 (P. L. 696), here referred to, is not materially different from the one in Indiana in question. It extended the lien to the ground covered by the building, and to so much other ground immediately adjacent thereto and belonging to the same owner as may be necessary for the ordinary and usual purposes of such building: and in constructing this statute the court has repeatedly held that the lien shares the fate of the building, and with the destruction of the latter the reason for binding the land ceases: *Church* v. *Stettler*, 26 Pa. 246 (1856); *Wigton's Appeal*, 28 Pa. 161 (1857); *Linden Street Co.* v. *Manufacturing Co.*, 158 Pa. 246 (1893). This view is sustained by *Coddington* v. *Dry Dock Co.*, 31 N. J. L. 477 (1865); *Goodman* v. *Baerlocker*, 60 N. W. 415, (Wis.) 1894; *Schukraft* v. *Ruck*, 6 Daly 1 (1875); *Shines Ex.* v. *Heimburger*, 60 Mo. App. 174 (1894); *Tunis* v. *Park*

Asso'n, 33 Pac. Rep. 63 (Cal.) (1893); and see *Houck on Liens*, 5203.

Other courts have been disposed to construe the law liberally in favor of the mechanics and material-men, and to subject the land, after the destruction of the building, to their liens: *Freeman* v. *Getchell*, 27 Minn. 516 (1881); *Clark* v. *Powell*, 58 Iowa, 509 (1882); *Steigleman* v. *McBride*, 17 Ill. 300 (1855). In most, if not indeed in all, of this latter class of cases, it may be admitted that the statutes reserving the right of lien are quite capable of the interpretation placed upon them by the courts, if one is prepared to adopt the rule of construction which is applied by them. While no entirely harmonious rule may be possible, inasmuch as the right of lien in each State is dependent upon distinct legislative enactments, yet since the general object of such acts is the same, and, as the cases admit, the statutes are, in fact, conflicting in no material particulars, one would suppose that in such a case as the one presented the courts would reach similar results. That, under such circumstances, one class of cases should present a conclusion diametrically opposed to that reached in other jurisdictions, would seem to indicate that a different rule of construction had been applied. Such, indeed, is the case. Those courts which follow the reasoning in the principal case, overlooking the fact that the statutes creating the right of lien are, in the main, mere arbitrary legislative enactments, which give to one an interest and a right in the property of another, which did not exist at the Common Law, adopt a liberal interpretation. They observe that the legislative interest was to aid and protect laborers and material-men, and proceed to construe the statutes accordingly, thereby departing from the cardinal principle of statutory construction that such enactments must be interpreted with strictness, inasmuch as by them new rights affecting the property interest of others are created. It seems difficult, therefore, to reconcile the conclusion of the leading case with principles so long acknowledged and adhered to, and one is inclined to adopt the reasoning of the Pennsylvania court and those that follow its conclusions.

CITIZENSHIP UNDER THE FOURTEENTH AMENDMENT. A decision by one of the district courts of California, delivered on the third of last January, brings to the consideration of the legal profession a question not only of great importance, but one also of much nicety. One Wong Kim Ark was born in 1873, in the State of California, of parents who, though at that time residents here, were subjects of the Emperor of China. His parents continued to reside here until 1890, when they took permanent leave. Wong Kim Ark remained in the United States until 1894, when he departed on a temporary visit to the land of his race. In August, 1895, he returned, and applied to the Collector of the Port to be permitted to land, and his application was refused upon the sole ground that he was not a citizen of this country. Upon this refusal, a petition

for a writ of *habeas corpus* was filed for him in the district court, where it was held by Morrow, J., that, having been born here, he was, by virtue of the Fourteenth Amendment to the Constitution of the United States, a natural-born American citizen, and was being unjustly restrained of his right to return to this country.

The said Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside." It is unquestioned that this declaration is decisive of the question of what constitutes citizenship, but the difficulty arises in determining the import of the words "and subject to the jurisdiction thereof;" whether, by them, it is meant the mere obligation of obedience to her laws, or subject in a broader sense to her political jurisdiction.

At Common Law, if the parent be under the actual obedience of the king, and the place of the child's birth be within the king's obedience, as well as in his dominion, the child becomes a subject of the realm. But, by International Law, birth follows the political status of the father, and of the mother when the child is illegitimate. So that it is quite evident that the proper solution of the difficulty rests upon the discernment of the true scope of the meaning of the word jurisdiction as it appears in the Constitution in the clause referred to.

This case is not altogether a new one, but has been previously decided in three cases in inferior courts: *Lynch* v. *Clark*, 1 Sandf. Ch. (N. Y.) 583 (1844); *Gee Fook Sing* v. *United States*, 49 Fed. Rep. 146 (1892): *In re Look Tin Sing*, 21 Fed. Rep. 905 (1884); in the last of which the opinion was rendered by the present Justice Field of the Supreme Court, all three adopting the Common Law rule, viz., that birth within the realm is conclusive. The question seems never to have been before the Supreme Court of the United States for decision. It has, however, been incidentally there, and in one case, *Minor* v. *Happersett*, 21 Wall. 168 (1874), they refused to decide the point, and in another, *The Slaughter-House Cases*, 16 Wall. 73 (1872), they, by a dictum, construe the clause in direct conflict with the decision of Field, J., when in the lower court. It is worthy of note that Justice Field dissents in the latter case.

It is unquestionably the function of the courts to interpret this language, but in doing so it seems that they are not called upon to impute to the States an intention which might very probably involve the Government in serious complications with foreign powers, especially when the alternative construction is in equal probability the one intended, and by far the more logical. If Chinamen born here of resident parents are citizens, the same is true of those born of parents casually here with no intention of remaining, and the United States are bound to protect them wherever they go. Now, since the United States also claims as citizens children born abroad of parents who are citizens of this country,

they cannot deny the same right to any foreign state, including China. So that we have the case of persons owing allegiance to, and entitled to, the protection of different, and it may be hostile, countries. Surely such a circumstance cannot but be productive of embarrassment some time in the future.

Mr. George D. Collins, of the San Francisco bar, has ably advocated the adoption of the International rule of citizenship in two articles in the *American Law Review*: 18 American L. Rev. 831 (1884); 20 Id. 385 (1895), in which he expresses the hope that an occasion may soon arise for presenting the question to our Supreme Court for determination. In view of his interest in the point, he was associated with the Attorney-General in the present case as *amicus curiæ*. There is an intimation in the opinion of Morrow, J., that the decision was contrary to Mr. Collins' contention because of the previous binding decisions, for he says: "The doctrine of the law of nations . . . is undoubtedly more logical, reasonable, and satisfactory, but this consideration will not justify this court in declaring it to be the law against controlling judicial authority."

In view, then, of the fact that thousands of this race are now, if the above decision is wrong, improperly exercising the political franchise, and of the other still greater objection mentioned, it is to be hoped that this case be appealed to the Supreme Court for its solution.

Extension of Liability for Negligence. In the case of *Lewis* v. *Terry*, (Cal.) 43 Pac. Rep. 398 (1896), there is an extension of the liability of the vendor of an article for injuries resulting therefrom to third persons. The defendants, furniture dealers, sold a defectively constructed folding-bed, knowing it to be dangerous, but representing it to be safe. The plaintiff, a lodger in the house of the vendee, having been injured by reason of the latent defect in the bed, brought an action of tort against the vendor. The Supreme Court of California held that a demurrer to the complaint should have been overruled, the absence of contractual relation between the parties to the suit being immaterial.

This seems to be a strong application of the doctrine enunicated in prior American cases, that a person who, in dealing with inherently dangerous articles, negligently or wilfully puts in circulation one in which there is a latent defect or source of peril, threatening great bodily harm to the public, is liable for injuries resulting from his action, independent of any relation of contract. The cases have dealt mostly with injuries occasioned by fire-arms, explosives and dangerous drugs, in handling which there is a duty of consummate care: *e. g.*, *Thomas* v. *Winchester*, 6 N. Y. 397 (1852), where a recovery was allowed for the negligent sale of a poisonous drug, whereby one, not a party to the contract, was made seriously ill. The California case extends this general liability to the

vendor of an article not inherently dangerous but dangerous because of a defect in construction of which he is aware.

The English cases have not laid down so broad a rule, but have, usually, based a recovery on some contractual or similar relation between the parties litigant, sufficient to charge the defendant with fraud and deceit in selling the article. The limitation is apparent in *Langridge* v. *Levy*, 2 M. & W. 519 (1837); and *George* v. *Skivington*, L. R. 5 Ex. 1 (1869). But a broader principle might well have been enunciated in these cases had the courts been willing to give full effect to the precedent in *Dixon* v. *Bell*, 5 M & S. 198 (1816), where the owner was held liable for injuries resulting to a stranger from the accidental discharge of a gun in the hands of an incompetent person, on the ground that he should have rendered it incapable of doing mischief before entrusting it to such care.