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Sunday Laws—Acts of Necessity or Charity—Gasoline Not “Necessity”

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ordinance which prohibited the erection within the municipality of all billboards designed for advertising purposes, except signs of certain dimensions advertising realty for sale, or for rent. The county court convicted the defendant for a violation of the ordinance sustaining the validity of the ordinance on aesthetic grounds alone. On appeal, *held*, that the ordinance was invalid as being an unwarranted exercise of police power, as depriving the owner of the free use of his property, and as not tending to promote public safety, health, or general welfare, *People v. Wolf*, (1926) 127 Misc., 382, 216 N. Y. S., 241.

In the United States, the courts have held almost uniformly that the police power can not be exercised solely for aesthetic purposes. *Curran v. Denver*, 47 Colo., 221, 107 Pac., 261; *Commonwealth v. Boston Advertising Company*, 188 Mass., 348, 74 N. E., 601; *Passaic v. Patterson Bill Posting Company*, 72 N. J. L., 285, 62 Atl. 267; *State v. Whitlock*, 149 N. C., 542, 63 S. E., 123. Ordinances prohibiting the erection of advertising signs near public parks and boulevards have been held invalid as the unwarranted confiscation of private property to promote beauty alone, rather than to protect public rights which are imperiled. *Chicago v. Gunning System*, 214 Ill., 628, 73 N. E., 1035; *Haller Sign Works v. Training School*, 249 Ill., 436, 94 N. E., 920. In *Isenbath v. Barnett*, 206 App. Div., 546, the court held that, "the aesthetic is a matter to be secured so far as it may be by private covenant without the backing of police power," and quoting from the *Haller Sign Works v. Training School*, *supra*, the court said, "advancement along these lines (speaking of the aesthetic) has so far been left to schools and colleges, and under the influence of social intercourse." Ordinances prohibiting the erection of billboards in particular localities have been upheld as being within the police power. *Cusack v. Chicago*, 242 U. S., 526; *Gunning v. St. Louis*, 235 Mo., 99, 137 S. W., 929; *St. Louis Poster Company v. St. Louis*, 249 U. S., 269. Such ordinances do not bar billboards, however, by reason of their offensiveness to the aesthetic senses, but primarily because signboards afford increased hazards from fires, high winds, and interfere with the passage of sunlight and air, thereby jeopardizing public interest. Within recent years, increased population in urban districts has warranted an extension of the police power as evidenced by zoning regulations. *Wulfson v. Burden*, 241 N. Y., 288, 150 N. E., 120; *Bacon v. Walker*, 204 U. S., 311. The courts in upholding the zoning laws have been inclined to recognize, as incidental to the dominant factors of public health and safety, the auxiliary element of beauty. *Welsh v. Swasey*, 193 Mass., 364, 79 N. E., 745; *Cinello v. New Orleans*, 154 La. 271, 97 So., 440; *State v. Haughton*, 144 Minn., 1, 174 N. W., 885. Possibly the furthest extreme yet mentioned by any court is seen in the dissenting opinion of Judge Holt in *State v. Haughton*, *supra*, where he said, "it is time the courts recognized the aesthetic as a factor in life. Who will dispute that the general welfare of dwellers in our congested cities is promoted if they be allowed to have their homes in fit and harmonious or beautiful surroundings?" J. R. B. '28.

SUNDAY LAWS—ACTS OF NECESSITY OR CHARITY—GASOLINE NOT "NECESSITY."
 —Defendant was indicted for violating a city ordinance which prohibited, under penalty, the sale of goods, wares and merchandise on Sunday, and provided that "charity or necessity on the part of the customer may be shown in justification of the violation of this ordinance." Defendant opened his filling station on the Sabbath day to dispense gasoline to physicians, officers of the law, tourists, and patrons of his garage which he ran in connection with the filling station. Although defendant sold gasoline only to those who signed statements that it was necessary for them to have it, the particular circumstances under which the sales were made did not appear in the record. The circuit judge instructed the jury to return a verdict of guilty and defendant appeals on ground that this being the motor age, the sale of gasoline on Sunday is an inherent, essential, and

vital necessity. *Held*, that the sale of gasoline is not such a "necessity" as to be permissible on Sunday within the meaning of this law. The sales to physicians, officers, tourists, and persons who kept automobiles in defendant's garage were not within the exception of the necessity clause contained in the ordinance, and no such emergency was shown by the testimony as brought them within the exception. The burden was on the defendant to bring himself within the exception. Affirmed. *Rhodes v. City of Hope*, (Ark. 1926), 286 S. W., 877.

There is nothing in this case that in any way contravenes what has been decided in other Sunday law cases, but it is of interest to review the cases to determine what have and what have not been held to be acts of charity or necessity. The following have been held to be acts of charity or necessity so as to come within the exception to the operation of the various laws prohibiting labor or sales on Sunday and excepting acts of charity or necessity: keeping open of hotels, boarding houses, and restaurants for the accommodation of the public, 37 Cyc. 553, 27 Am. & Eng. Ency. of Law, 400; selling bread and butter sandwiches, chocolate and coffee, *Com. v. London*, 149 Ky., 372, 149 S. W., 852; delivery of milk, *City of Topeka v. Hempstead*, 58 Kan., 328, 49 P. 87; carrying mail by stage coach, *Com. v. Knox*, 6 Mass., 76; running of street railway cars in cities, *Augusta & S. R. Co. v. Renz*, 55 Ga., 126; carrying freight, *State v. C. B. & Q. R. Co.*, 239 Mo., 196, 143 S. W., 785; shipping goods by boat when longer delay was dangerous because of risk of closing of the navigation for the season, *McGatrick v. Watson*, 4 Ohio St., 566; repairing by railroad of part of track that has suddenly become unsafe, *Louisville & N. R. Co. v. Com.*, 92 Ky., 114, 17 S. W., 274, 13 Ky. Law Rep., 439, *Yonoski v. State*, 79 Ind., 393, 41 Am. Rep., 614, *Com. v. Fields*, 4 Pa. Co. Ct. R., 434; riding on train for exercise, *Sullivan v. Maine Cent. R. Co.*, 82 Me., 196, 19 Atl., 169, 8 L. R. A., 427; repairing a defect in highway, *Flagg v. Inhab. of Millbury*, 58 Mass., 243; *Alexander v. Town of Oshkosh*, 33 Wis., 277; reaping a field of oats to prevent the loss thereof, *Johnson v. People*, 42 Ill. App., 594; turning or handling of barley used in making beer, *Crockett v. State*, 33 Ind., 416; picking ripe water-melons, *Wilkinson v. State*, 59 Ind., 416, 26 Am. Rep., 84; boiling down maple sap where the sap is flowing freely, the party's troughs are full and he has no other way to save the increase, *Morris v. State*, 31 Ind., 189, *Whitcomb v. Gilman*, 35 Vt., 297; gathering feed for hogs, *Edgerton v. State*, 67 Ind., 588, 33 Am. Rep., 10; operating ice factory, *Hennersdorf v. State*, 25 Tex. App., 597, 8 S. W., 926, 8 Am. St. Rep., 448; repairing belt in mill employing two hundred persons, which broke on Saturday and could not be repaired on that day, *State v. Collett*, 72 Ark., 167, 79 S. W., 791, 64 L. R. A. 204; operating of plant for manufacture of "carbon black" when any cessation of operation would injuriously and materially affect the quality of the product, *Natural Gas Products Co. v. Thurman* (Ky.) 265 S. W., 475; generating steam for the purpose of supplying water and light to a town and its inhabitants, and cleaning the boilers of said plant, *Turner v. State*, 85 Ark., 188, 107, S. W., 388; pumping oil well where material permanent loss would come to owner by not pumping it on Sunday, *State v. McBee*, 52 W. Va., 257, 43 S. E., 121, 60 L. R. A., 638; sending telegram asking doctor to attend sick person, *Western U. Tel. Co. v. Griffin*, 1 Ind. App., 46, 27 N. E., 113; notification of death by telegram, *Western U. Tel. Co. v. Wilson*, 93 Ala., 32, 9 So., 414, 30 Am. St. Rep., 23, *Gulf C. & S. F. Ry. Co. v. Levy*, 5 Ky. Law Rep. (note); sending telegram to wife telling when husband would return, *Western U. Tel. Co. v. Fulling*, 49 Ind. App., 172, 96 N. E., 967, *Burnett v. Western U. Tel. Co.*, 39 Mo. App., 599; sending telegram telling time of arrival at deathbed of mother, *Western U. Tel. Co. v. Henley*, 23 Ind. App., 14, 54 N. E., 775; contract to secure decent burial, *Gulf, C. & S. F. Ry. Co. v. Levy*, *supra*; hiring horse to attend funeral, *Horne v. Meakin*, 115 Mass., 326; employment of undertaker, *McNamee v. McNamee*, 9 N. Y. St. Rep., 720; travel-

ing to assist sick friend, *Doyle v. Lynn & B. R. Co.*, 118 Mass., 195, 19 Am. Rep., 431; taking prisoner to jail, *Fisher v. Kyle*, 27 Mich., 454; attending the penitentiary by guard, *Page v. O'Sullivan*, 159 Ky., 703, 169 S. W., 542; giving note to secure bond for prisoner held under warrant charging a bailable offense, *Few v. Gunter*, 10 Ga. App., 100, 72 S. E., 720; contract for relief of sick pauper, *Aldrich v. Blackstone*, 128 Mass., 148; driving employer's family to church, *Com v. Nesbit*, 34 Pa., 398; traveling to prepare breakfast for employer, *Crosman v. City of Lynn*, 121 Mass., 301; all the necessary and usual work connected with religious worship, including the soliciting or making of subscriptions to payment of indebtedness of a church for the erection of its church building, *Allen v. Duffie*, 43 Mich., 1, 4 N. W., 427, 38 Am. Rep., 159; *First M. E. Church v. Donnell*, 110 Iowa, 5, 81 N. W., 171, 46 L. R. A., 858; *Hodges v. Nalty*, 113 Wis., 567, 89 N. W., 835; *Bryan v. Watson*, 127 Ind., 42, 26 N. E., 666, 11 L. R. A., 63; *Dale v. Knepp*, 98 Pa., 389, 42 Am. Rep., 642; transaction of business by benefit association whose object is to relieve members and their families in case of sickness and death, *Pepin v. Societe St. Jean Baptiste*, 24 R. I., 550, 54 A., 47, 60 L. R. A. 626; contract by creditor to save his debt or procure indemnity against liability, *Hooper v. Edwards*, 18 Ala., 280; and operating swimming pool where it tends to prevent disorder or indecent exposures by persons along streams, *Lakeside Inn Corp. v. Com.*, 134 Va., 696, 114 S. E., 769.

On the other hand, the following acts have been held not to have been acts of charity or necessity in the operation of Sunday laws: keeping open of a place for the sale of meats, *Beal v. State*, 9 Ohio App., 319; selling meats, *Arnheiter v. State*, 115 Ga., 572, 41 S. E., 989, 58 L. R. A., 392; traveling on Sunday to supply market with fresh meat on Monday, *Jones v. Inhabit. of Andover*, 92 Mass., 18; sale of soft drinks, *State ex rel Smith v. Wertz*, 91 W. Va., 622, 114 S. E., 242, 29 A. L. R., 391; delivery of bread outside the premises of the baker, *Com. v. McCarthy*, 244 Mass., 484, 138 N. E., 835; sales of ice cream or cigars, *Oliveros v. Henderson*, 116 S. Car. 106, 106 S. E., 855; sales of soda water, soft drinks, Coca Cola, cigars and tobacco, *McAfee v. Com.*, 173 Ky., 83, 190 S. W., 671; ordinary sales of ice or fresh meat, *State v. James*, 81 S. Car., 197, 62 S. E., 214, 18 L. R. A., (N. S.) 617, 128 Am. St. Rep., 902, 16 Ann. Cas., 277; sale of gasoline, *Rhodes v. City of Hope*, (Ark. 1926), 286 S. W., 877; collecting clothes for laundry, *State v. Lavoie*, 78 N. H., 99, 97 Atl., 566; sales of engine oil by trader in auto supplies, *Grimes v. State*, 82 Tex. Crim., 512, 200 S. W., 378; work of barber, *State v. Schatt*, 128 Mo. App., 622, 107 S. W., 10; *Gray v. Com.*, 171 Ky., 269, 188 S. W., 354; *Petit v. Minnesota*, 177 U. S., 164, 20 Sup. Ct., 666, 44 L. Ed. 716, *State v. Kuehner*, (Mo. App.), 110 S. W., 605, *State v. Linsig*, 178 Iowa, 484, 159 N. W., 995, *Ex parte Kennedy*, 42 Tex. Crim., 148, 58 S. W., 129, 51 L. R. A., 270, *State v. Sopher*, 25 Utah 318, 71 P. 482, 60 L. R. A., 468, 95 Am. St. Rep., 845, *State v. Wellott*, 54 Mo. App., 310, *State v. Schuler*, 10 Ohio, Dec., 806, 23 Wkly. Law Bul., 450, *Com. v. Williams*, (Pa.) 1 Pears., 61; transportation of engine for use in threshing wheat on Monday, pursuant to contract, *State v. Stuckey*, 98 Mo. App., 664, 73 S. W., 735; repairing a street in a populous part of the city, *People v. Lynch*, 141 N. Y. S., 728, 156 App. Div., 601, 29 N. Y. Cr. R., 544; repairing a driveway to a public garage, *Watkins v. City*, 134 Miss., 556, 99 So. 363; labor performed in the operation of a train, *Barefield v. State*, 85 Ark., 134, 107 S. W., 393; gathering cranberries when there is an unusually large crop, *Com. v. White*, 190 Mass., 578, 77 N. E., 636; cutting wheat by poor man who could only borrow implements on Sunday, *State v. Goff*, 20 Ark., 289; gathering of sea weed which had been washed ashore, *Com. v. Sampson*, 97 Mass., 407; hoeing of crops in a field, *Com. v. Josselyn*, 97 Mass., 411; pumping of oil well when there was a flow of two barrels of salt water per day into it, *Com. v. Funk*, (Quart. Sess.) 9 Pa. Co. Ct. R., 277; repairing a mill on Sunday to save a week day in the operation of the mill, *Hamilton v. Austin*, 62 N. H., 575; clearing out of a wheel pit for the purpose of

preventing the stoppage, on a week day, of mills which employed many hands, *McGrath v. Merwin*, 112 Mass., 467, 17 Am. Rep., 119; constructing a building, *Lane v. State*, 68 Tex. Crim. R., 4, 150 S. W. 637; sending a telegram regarding business that can be transacted as well on any other day, *Western U. Tel. Co. v. Yopst*, 118 Ind., 248, 20 N. E., 222, 3 L. R. A., 224, *Western U. Tel. Co. v. Henley*, 23 Ind. App., 14, 54 N. E., 775, *Western U. Tel. Co. v. Hutcheson*, 91 Ga., 252, 18 S. E., 297, *Willingham v. Western U. Tel. Co.*, 91 Ga., 449, 18 S. E., 298, *Rogers v. Western U. Tel. Co.*, 78 Ind., 169, 41 Am. Rep., 558; services of attorney in rearranging partnership business, *Jones v. Brantley*, 121 Miss., 721, 83 So., 802; publishing a newspaper, *Hardy v. St. Paul Globe Pub. Co.*, 41 Minn., 188, 42 N. W., 872, 16 Am. St. Rep., 695, 4 L. R. A., 466, *Smith v. Wilcox*, 24 N. Y., 353; printing advertisements in newspaper, *Sentinel Co. v. Meiselbach Co.*, 144 Wis., 224, 128 N. W., 861, 32 L. R. A., (N. S.) 436, 140 Am. St. Rep., 1007, (cf. *Pulitzer Pub. Co. v. McNichols*, (Mo.) 181 S. W., 1 L. R. A. 1916C 1148); selling newspapers, *Com. v. Matthews*, 152 Pa., 166, 25 Atl., 548, 18 L. R. A., 761; operating a picture show, *State v. Kennedy*, (Mo. App. 1925), 277 S. W., 943, *State v. Smith*, (Okla. 1921) 198 P. 879; same, to break monotony of army life at great army camp, *Rosenbaum v. State*, 131 Ark., 251, 199 S. W., 388, L. R. A., 1918B 1109, *Capitol Theatre Co. v. Com.*, 178 Ky., 780, 199 S. W., 1076; same, where proceeds are given to charity, *Rosenberg v. Arrowsmith*, 82 N. J. Eq., 570, 89 Atl., 524; and assessing property for taxation, and checking up the week's work, *Stellhorn v. Bd. of Commrs.*, 60 Ind. App., 14, 110 N. E., 89.

In comparing the construction of the Sunday laws it must be remembered that the alleged and actual violations above enumerated have occurred under statutes and ordinances varying in their wording, and in different states, and at different times in the history of our country. It is also important to know that in some states the question whether a certain act or labor is a work of necessity or charity is one of fact to be determined by the jury from the circumstances of each case, whereas in a few states the question is purely a question of law for the court. The rule in Missouri (*State v. Schatt*, 128 Mo. App. 622, 107 S. W. 10) and some other states is that where reasonable minds differ, it is a question for the jury, but where the nature of the work is such that no reasonable minds would differ, the court may treat the question as one of law. See exhaustive note in 29 A. L. R., 1298. C. S. N. '27.

Book Reviews

A TREATMENT OF THE FUNDAMENTAL PRINCIPLES OF THE LAW OF CONTRACTS; WITH DIGEST OF CASES CONTAINED IN THE SECOND EDITION OF KEENER'S AND WILLISTON'S CASEBOOK, AND LEADING CASES IN OTHER CASEBOOKS ON CONTRACTS. By *Carl Helm*, LL.B., Member of the New York Bar, pp. xxiv and 580. New York City: Central Book Company, 1926.

This is a well manufactured book of 580 pages of thin paper in limp leather cover. In his preface the author states that the purpose of the book is to assist teachers and "as an aid to students in their study" of contracts "by the case system." The author says also that the book will "afford a thorough, concise review for graduates and practitioners." It is not likely that practicing lawyers will find much of value in the book. To practicing lawyers law is a reality, something which actually exists in human experience whereby human disputes are settled,—most of them out of court. In the language of the Supreme Court of the United States: "Law is a statement of the circumstances in