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SUNDAY LAWS—THE POLICE POWER. Sunday laws whose application is uniform have generally been deemed constitutional. The Legislature may restrict labor in various callings to certain hours of the day, or to certain days of the week, if it deems such restriction essential to the physical and moral health of the community. Moreover, Christianity is part of the law of the land, and one of the doctrines of Christianity is that one day of the week should be freed from secular pursuits, and set apart, in theory, at least, for religious observances. (See AM. L. REG. & REV., Vols. XXXI., p. 723, and XXXII., p. 437.) A further consideration is involved, however, when statutes are directed at particular classes and particular localities. Laws making illegal the opening of barber shops on Sunday have been passed recently in several of the States. *Eden* v. *The People*, 43 N. E. Rep., No. 12, p. 1108, and *Ex parte Jentsch*, 44 Pac. Rep., No. 8, p. 803, decided that such a law was unconstitutional, declaring, in effect, that one class should not be its special victims; that it was a deprivation of property without due process of law, and could not be sustained as a valid exercise of the police power. It may be remarked, however,

that if a law operates uniformly on all in the same or competitive lines of business, is actuated by a rational public consideration, and is otherwise unobjectionable, it should be declared invalid on the ground that it is class legislation. And of the necessity of legislation for all of a given class the Legislature is the judge. If barbers are especial or sole offenders among those whose business does not necessitate work on Sunday, it would appear to be in the power of the Legislature, on the score of health, or of good morals and Christianity, to pass a prohibitory law for them compelling observance of the national Sabbath.

People v. *Havnor*, 43 N. E. Rep., No. 7, p. 541, decided April 14, 1896, by the New York Court of Appeals, introduces a new element, however. The case arises under a statute providing that anyone who carries on the business of a barber on Sunday commits a criminal offence, except that in the city of New York and the village of Saratoga his shop may be kept open till one o'clock. The court holds that the statute was passed in the valid exercise of the police power, which "guards the health, the welfare, and the safety of the public" It proceeds to say that not everything that the Legislature chooses to say is to be regarded as a valid exercise of this power, but that any exercise of it must have a reasonable connection with the general welfare, and then concludes, on the strength of decisions holding that it is for the general welfare that the Legislature should pass laws prohibiting work on the first day of the week, that this law is constitutional. Three judges dissent, the grounds being that the statute discriminates unreasonably, and that it is vicious class legislation, in direct violation of the Fourteenth Amendment. Certainly the discrimination between those engaged in the same calling seems striking and unreasonable. The law makes an act lawful in one city only and criminal in all the rest; reasonably connected with the general welfare of one village, but not so with any of the rest; one law during the day for the whole State, and another during part of the day for two entirely different communities. Conceding the right to make particular laws for particular occupations and for particular localities, still it would seem that a law which so arbitrarily singles out one city and village from all other cities and villages, so far from furnishing "equal protection of the laws," was distinct class legislation. To admit such a statute under the police power, which allows only laws reasonably connected with the health, order, business, and general welfare of the community, without examining and demonstrating its reasonableness, when on its face it is obviously discriminating and wholly unreasonable, is to give to that power a dangerous and unwarranted comprehensiveness.

REVERTER OF LAND GRANTED FOR SPECIAL PURPOSE. *Stuart* v. *City of Easton and County of Northampton*, June, 1896, (not yet reported,) U. S. Circuit Court of Appeals, for Third District.

In 1764, Thomas Penn and Richard Penn conveyed "a lot of

ground unto AB. *et al.*, their heirs and assigns forever in trust nevertheless, to and for the erecting thereon a courthouse for the public use and service of the said county, *and to and for no other use, intent or purpose whatsoever.*" The patent contains no punctuation. These trustees had been authorized in 1752 by an Act of Assembly "to take assurances of a piece of land for the use of the inhabitants of said County, and thereon to erect a courthouse and prison, &c."

By virtue of an Act of Assembly of 1834 (P. L. 538), the title of the trustees became vested in the County of Northampton. A courthouse was erected upon the ground and remained there until 1862, when it was removed, and no other buildings have been erected thereon since. In 1888, the heir at law of the Penns made entry for breach of condition, and brought ejectment. The question arises, Does the patent of 1764 convey a fee simple absolute or an estate upon condition, a base fee?

The learned court evaded this question by separately construing the premises and the habendum: "The succeeding words in trust nevertheless to and for the erecting thereon a courthouse for the public use and service of the said county and to and for no other use, intent or purpose, whatsoever defined the relation between the grantees and the inhabitants of the county, and restrained the grantees from any other application of the property than to the avowed object of the grant."

Surely this is a strained construction; in none of the cases cited has it been even suggested. The court continues: "In the absence, then, of express stipulation, is it to be supposed that the grant of a conditional estate, determinable by re-entry upon non-user, was intended?" After the above disposition of a stipulation, which, in Pennsylvania, whose decisions the court is bound to follow in this case, has always been held to constitute a fee upon condition, the learned judge asks for an "express stipulation." The court was of opinion that the grant was a charitable use, and that in the absence of an express provision for a reverter to the grantors in the event of a misuser or non-user, no right of entry to defeat such use was to be implied. The consideration of that question has no place in the decision of this case.

It has never been disputed that a man may make such legal disposition of his property as he chooses, and when he has made such conveyance the courts are bound to effectually construe his deed. Fees upon condition have been recognized immemorially.

It is settled that the mere expression in a conveyance of the purpose of a grant will not, of itself, create a condition: *Kerlin* v. *Campbell*, 15 Pa. 500 (1850); *Seebold* v. *Shitler*, 34 Pa. 133 (1859). A base fee may be created without the usual technical words, *sub conditione, proviso, ita quod: Church* v. *Ground Co.*, 103 Pa. 613 (1883). Nor is an express stipulation that, upon breach of condition, the grantor may re-enter, necessary; it is implied as part of the grant: IV Kent Com. 123; *Gray* v. *Blanchard*,

8 Pick. 284; *Osgood* v. *Abbott*, 58 Me. 80. Where conveyances in fee simple, stating the purpose of the grant, were made, with the superadded words, "and for no other use whatsoever," (*Sheetz* v. *Fitzwater*, 5 Pa. 126 (1847); 2 L. C. Am. R. P. 13), "and no other purpose," (*Kirk* v. *King*, 3 Pa. 436 (1846); *Crane* v. *Hyde*, 135 Mass. 147), it was held that base fees were granted. In *Kirk* v. *King*, the conveyance was to a trustee. And as recently as 1892, in *Slegel* v. *Lauer*, 148 Pa. 244, the Supreme Court, in a two-line *per curiam* opinion, adopted the exhaustive opinion of Endlich, J., where a conveyance made to county commissioners for a specific purpose, without superadded words, was held to convey a fee upon condition, the use for the particular purpose constituting part of the consideration for the grant. The learned judge, in this case, said: "But, where an estate is conveyed for a specific purpose, 'and no other,' the fee is a fee upon condition, determinable upon cessation of the use of the property for that purpose: *Kirk* v. *King* (*supra*); *Sheetz* v. *Fitzwater* (*supra*); *a fortiori* should the words '*to and for no other use intent or purpose whatsoever*' constitute a fee upon condition."

Agreeing with the learned judge that a grant for such a purpose might be a charitable use, it is submitted that the premises for such conclusion are wanting here. The conveyance to the trustees authorized by Act of Assembly to receive such assurances was, in the language of Lowrie, C. J., in construing a similar deed to trustees in trust for a church congregation, "mere matter of form, and does not at all make this case a charitable use:" *Brendle* v. *Congregation*, 33 Pa. 415 (1858). In that case the deed was held to vest an executed legal estate in the congregation. Moreover, in 1834, the trustees' title became vested in the county, and during its tenure of the qualified fee simple estate the breach of condition occurred. When the specified purpose of the grant ceases, the estate of the trustees cease: *McKissick* v. *Pickle*, 21 Pa. 232 (1853); *Henderson* v. *Hunter*, 59 Pa. 335 (1868). In the latter case, the conveyance was to trustees for a specified purpose, and it was held that the trustees took merely a fee upon condition, which terminated when the premises ceased to be used for the specified purpose. The same conclusion was reached in *Slegel* v. *Lauer*, (*supra*), where the conveyance in 1772 was to the Commissioners, to and for the use, etc. Neither upon principle nor upon authority does the learned court's conclusion seem tenable.

[It is a curious fact that in 1852, when these defendants removed from a lot granted by a similar patent for a prison, "and for no other use whatever," they purchased from the three heirs-at-law of the Penns their reversionary interest in the property.]

SELF-INCRIMINATING TESTIMONY. In the recent case of *Brown* v. *Walker*, 16 Supreme Ct. Rep. 644, the important issue arose of an alleged incompatibility between that clause of the Fifth Amendment of the Constitution, which says that "no person . . . . shall

be compelled in any criminal case to be a witness against himself," and the Act of Congress of Feb. 11, 1893, relative to the giving of testimony before the Interstate Commerce Commission, that "no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpœna of the commission, ... on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpœna, or the subpœna of either of them, or in any such case or proceeding."

Two main questions were considered by the Supreme Court: First, does the clause in the Fifth Amendment, that no one shall be compelled in a criminal case to be a witness against himself, mean that he shall not be required to give testimony when it will lead to his punishment, or is it to be interpreted to include the giving of testimony when it will expose the witness to infamy and disgrace, although a criminal prosecution might not follow? Second, is the protection given by the statute coextensive, to the necessary degree, with possible prosecution?

In consideration of the first point it is evident that in a criminal case no one could be compelled to give evidence in respect to a material fact if he might assert the privilege because of his testimony merely reflecting upon his character. A witness may be compelled in *civil cases* to testify as to matters which bring him into disgrace, yet which do not lead to punishment. There are innumerable transactions which are "o' the windy side of the law" and still prove a man's character to be anything but savory.

In criminal proceedings there are classes of cases which have been held to be exceptions, but which prove the general rule to refer to *punishment*, and not to the odium which may attach. These are laid down by Mr. Justice Brown, in his opinion for the majority of the court, under four headings:

1. If a witness waives his privilege, he is not permitted to stop, but must make a full disclosure, and is liable to cross-examination.

2. If prosecution for a crime is barred by the statute of limitations, the witness may be compelled to testify.

3. If the answer of the witness may have a tendency to disgrace him, and the proposed evidence be material to the issue on trial, the great weight of authority is that he may be compelled to answer.

4. The English cases, although following only a rule of evidence, hold that when the witness has already received a pardon, he can no longer claim the privilege of silence.

Numerous cases in various State courts have held, in analogy to the line of English cases above referred to, that the requirement is

satisfied if the witness is given full and adequate indemnity against any liability to prosecution. The majority of the Supreme Court held to this construction of the terms "witness against himself."

Mr. Justice Field dissented vigorously from that view. He based his opinion mainly upon the case of *Respublica* v. *Gibbs*, 3 Yeates, 429; he also advanced the argument that Congress has not the power to enact a statute to protect the individual, holding that the pardoning power is exclusively in the President. This appears to be against the weight of authority, for acts of general amnesty have almost invariably been sustained in this country, as well as in England.

The second point of vital importance considered by the court was in respect to the extent of the protection guaranteed by the Act of Congress. There is no doubt whatever as to the sufficiency of the protection within the Federal jurisdiction; but it was argued that a possibility exists of prosecution in the State courts. To quote the words of Mr. Justice Brown, "We are unable to appreciate the force of this suggestion. It is true that the Constitution does not operate upon a witness testifying in the State courts, since we have held that the first eight amendments are limitations only upon the powers of Congress and the Federal courts, and are not applicable to the several States, except so far as the Fourteenth Amendment may have made them applicable: *Barron* v. *Mazor*, 7 Pet. 243; *Fox* v. *State*, 5 How. 410; *Withers* v. *Buckley*, 20 How. 84; *Twitchell* v. *Com.*, 7 Wall. 321; *Presser* v. *State*, 116 U. S. 252.

"There is no such restriction, however, upon the applicability of Federal statutes. The sixth article of the Constitution declares that 'this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.'

"The language of this article is so direct and explicit that but few cases have arisen where this court has been called upon to interpret it, or to determine its applicability to state courts: . . . . *Stewart* v. *Kahn*, 11 Wall. 493; *United States* v. *Wylie*, 11 Wall. 508; *Mayfield* v. *Richards*, 115 U. S. 137."

Argument was also presented that a witness testifying under this decision might be prosecuted, and would then be put to the trouble and expense of pleading his immunity. No stress was laid upon this objection, as the law does not consider such a detriment; and again, anyone is liable, however innocent, to be prosecuted and compelled to plead a defense.

Mr. Justice Shiras, Mr. Justice Gray and Mr. Justice White concurring, delivered an opinion, in which he disagreed with the conclusion of the majority as to the efficiency of the immunity from State prosecution. This is probably the strongest argument advanced by the minority of the court. If the contention of Mr. Justice

Shiras, that Congress cannot prescribe rules of proceeding for the State courts, is correct, then apparently the ground of support for the holding would be that the requirement is fulfilled when complete protection is given within the jurisdiction gathering the evidence,—in this instance full protection within the domain of the Federal courts.

This decision that a witness may be compelled to give testimony, although self-incriminating, when shielded from criminal prosecution therefor, by reason of a previous legislative pardon, settles, for the present at least, an important question in evidence. The decision is of great practical moment, as wrongs by individuals, and of of late especially by large corporate concerns, have gone uncorrected on account of the ability of those having knowledge to shield themselves by that clause of the Fifth Amendment just considered.