

If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so. If a State were to punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines, the race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution for such acts would not make for respect for the federal statute or for its deterrent effect. But it is not for us to discuss the wisdom of legislation, it is enough for us to hold that, in the absence of special provisions by Congress, conviction and punishment in a state court under a state law for making, transporting and selling intoxicating liquors is not a bar to a prosecution in a court of the United States under the federal law for the same acts.<sup>13</sup>

The fact that cases of prosecution by both state and federal authorities for the same act are so rare, among the thousands of cases in which this is possible, shows that in practice our federal and state prosecuting officers recognize the policy involved and as a matter of comity in the great majority of cases refrain from prosecuting where the defendant has been punished in another jurisdiction.

C. S. POTTS.

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#### THE EXCEPTIONS AS TO WORKS OF NECESSITY AND CHARITY IN SUNDAY LABOR LAWS

From the accounts in the newspapers on the following day throughout the country, there was a strict enforcement of the Sunday labor law in Irvington, N. J. on Sunday, December 12, 1926. Many of the newspapers and their readers regarded this action as a remnant of the old "Blue Laws" and not of much importance as they no doubt thought that Sunday labor laws are in existence in only a few states and cities, and that they, especially in the Western states, of course had no such laws. As a matter of fact, statutes prohibiting labor of one sort or another exist in every state and territory in the Union, but not in the District of Columbia and the Philippine Islands.<sup>1</sup> While it is true that in a few states not all labor on Sunday is prohibited, almost all the states have statutes prohibiting all labor on Sunday, except acts of necessity and charity. Although Sunday labor statutes may not always be enforced as penal statutes, their existence is important in other matters, such as defeating actions on torts and contracts.

Much space has been devoted in the digests and legal periodicals to the subject of Sunday laws in its various phases, and even books have

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<sup>13</sup> 260 U. S. 385.

<sup>1</sup> U. S. BUREAU OF LABOR STATISTICS BULLETIN No. 370 (May 1925). See p. 66, where citations are given to the various state statutes. Bill is now pending in Congress for Sunday rest law in District of Columbia (H.R. 10311).

It appears that Sunday laws have been repealed in California, and the law providing for one day's rest in seven substituted for them. General Laws of Calif. (1923), Act. 4718.

been written on the subject.<sup>2</sup> For want of space, this note will not consider the question as to whether violating the Sunday laws will bar recovery in the courts, nor the laws prohibiting sales of goods, wares and merchandise on Sunday, nor the laws prohibiting specific acts on Sundays such as picture shows,<sup>3</sup> amusements,<sup>4</sup> and the like, but will be restricted to a consideration of the words "necessity" and "charity" as they appear in the general statutes of the various states prohibiting all labor on Sunday. As they are clearly without the scope of this note, the ethical questions as to whether Sunday laws should be more strictly or more liberally enforced,<sup>5</sup> and the use of Sunday as a day of rest<sup>6</sup> will not be discussed.

#### HISTORY

Sunday labor statutes are more than sixteen centuries old. The cases that go into the history of these laws generally begin with the following edict that appeared in Rome, about A. D. 321, during the reign of Constantine the Great: "Omnes iudices urbanaeque plebes et artium officia cunctarum uenerabili die solis quiescant. ruri tamen positi agrorum culturae libere licenterque inseruiant, quoniam frequenter euenit, ut non alio aptius die frumenta sulcis aut uinae scrobibus commendentur, ne occasione momenti pereat commoditas caelesti prouisione concessa."<sup>7</sup> England has had several statutes relating to Sunday labor, the chief one being that of 29 Chas. II ch. 7, commonly known as the "Lord's Day Act." Among other things, it was enacted " . . . that noe tradesman, artificer workeman labourer or other person whatsoever shall doe or exercise any worldly labour, busines or worke of their ordinary callings upon the Lords day or any part thereof (workes of necessity and charity onely excepted)."<sup>8</sup>

The earliest law passed in the United States is generally conceded to have been in 1617, when, in Virginia failure to attend church on Sunday was punishable. In 1650 the Plymouth Colony forbade "any seruire

<sup>2</sup> LEGAL ASPECTS OF THE FIRST DAY OF THE WEEK. (1891), by James T. Ringgold; A TREATISE OF SUNDAY LAWS, (1892), by Geo. E. Harris.

<sup>3</sup> See 94 CENTRAL LAW JOURNAL 10.

<sup>4</sup> See "Sunday Amusements," by Arthur L. Wilder in CASE AND COMMENT, Dec. 1915; reprinted in THE CO-OPERATOR, Feb. 1916.

<sup>5</sup> See 53 AMERICAN LAW REVIEW 379; series of articles by Wayne Womer in THE DEARBORN INDEPENDENT, Aug. 8, 1925, and following issues; "Charles Dickens and the Blue Sunday Laws," in THE BOOKMAN, June 1925. See recent issues of LIBERTY, (a religious publication).

<sup>6</sup> See "Polo as Prayer," LITERARY DIGEST, Jan. 23, 1926; and "Should Christians Play on Sunday?" Jan. 30, 1926; Congressional Record, Mar. 5, 1926, p. 5119, *et seq*; *Ibid.*, Mar. 16, 1926, p. 5724 *et seq*.

<sup>7</sup> CODEX JUST. ib. 3, tit. 12, lex. 2. This has been translated to mean: "Let all judges and city people and all tradesmen rest upon the venerable day of the Sun. But let those dwelling in the country freely and with full liberty attend to the culture of their fields, since it frequently happens that no other day is so fit for the sowing of grain or the planting of vines; hence the favorable time should not be allowed to pass, lest the provisions of heaven be lost." Rodman *et al. v. Robinson*, 134 N. C. 503, 47 S. E. 19.

<sup>8</sup> The Statutes: Revised Edition (1870), p. 779. See "The English Law as to Acts Done on Sunday," by W. E. Wilkinson in CASE AND COMMENT, Dec. 1915; reprinted in THE CO-OPERATOR, Feb. 1916.

work or any such like abuse" on the Lord's Day.<sup>9</sup> Since that time laws copied to a more or less extent from 29 Chas. II ch. 7 have been passed in most, if not all, of the states of the Union.<sup>10</sup>

In the absence of prohibitory statutes, the common law rule is that all labor and business other than judicial proceedings can be lawfully transacted on Sunday.<sup>11</sup>

#### CONSTITUTIONALITY

Laws prohibiting labor on Sunday have been held constitutional on the ground that they are a valid exercise of the police power.<sup>12</sup> In *Ex parte Newman*,<sup>13</sup> the California Sunday law was held unconstitutional<sup>14</sup> on the ground that it was an interference with religious freedom, but Justice Stephen J. Field dissented and his dissent was adopted in a later California case,<sup>15</sup> which overruled *Ex parte Newman*. Since that time the dissenting opinion of Justice Field has been quoted extensively in the opinions, all of which sustain the laws as a valid exercise of the police power.<sup>16</sup> Where the validity of Sunday laws is questioned because they may interfere with the free exercise and enjoyment of religious opinion, it is purely a state and not a federal question, because "The Constitution of the United States makes no provision for protecting citizens of the respective states in their religious liberties; nor does it impose any inhibition in this respect on the states."<sup>17</sup>

While many of the earlier cases contain statements expressing the idea that Sunday was set aside for religious reasons,<sup>18</sup> because Christian-

<sup>9</sup> Rodman et al. v. Robinson, *supra*, footnote 7.

<sup>10</sup> McPherson v. Village of Chebanse, 114 Ill. 46, 28 N. E. 454.

<sup>11</sup> 37 Cyc. 545; 25 R. C. L. 1414; 27 AM. & ENG. ENCY. LAW (2nd Ed.) 389; 27 HALSBURY'S LAWS OF ENGLAND 442; People v. Ramsey (N. Y. 1926), 217 N. Y. S. 799.

<sup>12</sup> Hennington v. State of Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 167; Frolickstein v. Mayor of Mobile, 40 Ala. 725; Elliott v. State, (Ariz. 1926), 242 P. 340; Scales v. State, 47 Ark. 475; McClelland v. City of Denver, 36 Colo. 486, 86 P. 126, 10 Ann. Cas. 1014; City of Clinton v. Wilson, 257 Ill. 580, 101 N. E. 192; Natural Gas Prod. Co. v. Thurman, 205 Ky. 100, 265 S. W. 475; Judefind v. State, 78 Md. 510, 22 L. R. A. 721; Com. v. Has, 122 Mass. 40; State v. Petit, 74 Minn. 376, 77 N. W. 225, affirmed in 177 U. S. 164, 20 Sup. Ct. 666, 44 L. Ed. 716; State v. Ambs, 20 Mo. 214; People v. Havnor, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707; Bloom v. Richards, 2 Oh. St. 387; Specht v. Com., 8 Pa. St. 312; Pirkey Bros. v. Com., 134 Va. 713, 114 S. E. 764, 29 A. L. R. 1290. The Sunday laws here considered are the general statutes prohibiting all labor on Sunday. For constitutionality of laws singling out special places of employment, see City of Morengo v. Rowland, 263 Ill. 531, 105 N. E. 285; Ex parte Westerfield, 55 Cal. 550, 36 Am. Rep. 47; State v. Graneman, 132 Mo. 326, 33 S. W. 784; State v. Pocock, 161 Minn. 376, 201 N. W. 610; Elliott v. State (Ariz. 1926), 242 P. 340. See COOLEY'S CONSTITUTIONAL LIMITATIONS, p. 476.

<sup>13</sup> 9 Cal. 502.

<sup>14</sup> Under the state constitution.

<sup>15</sup> Ex parte Andrews, 18 Cal. 679.

<sup>16</sup> See cases cited, *supra*, footnote 12.

<sup>17</sup> Brunswick-Balke-Collander Co. v. Evans et al., 228 F. 991.

<sup>18</sup> See Rosenbaum v. State, 131 Ark. 251, 199 S. W. 388, L. R. A. 1918B 1109; State v. R. R., 239 Mo. 196, 143 S. W. 785; and RINGGOLD, ch. II. *supra*, footnote 2. See also Gillooley v. Vaughn et al (Fla. 1926), 110 So. 653.

ity is interwoven in our laws,<sup>19</sup> the modern theory is that these laws provide a day of rest which is required for the physical, intellectual and moral welfare of mankind,<sup>20</sup> and it is no part of the object of the acts to enforce the observance of a religious duty.<sup>21</sup> For this reason the legislature could just as well set aside any other day of the week.<sup>22</sup>

#### THE WORDING OF THE STATUTES

The typical statute prohibiting Sunday labor simply prohibits labor on Sunday excepting acts of necessity and charity, but there are several variations. For instance, the Oklahoma statute prohibits "servile labor,"<sup>23</sup> and the Illinois statute<sup>24</sup> provides a penalty for "Whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted), or by any amusement or diversion on Sunday." Some statutes use the word "Sabbath," which means the same as "Sunday."<sup>25</sup> The Missouri statute excepts "household offices of daily necessity."<sup>26</sup> It is essential to consider the wording of the statutes when the decisions of one state are compared with those of another state, on what might superficially appear to be the same facts.

Practically all the laws except "acts" or "works" of necessity and charity. If they did not contain such exceptions they would probably be unconstitutional.<sup>27</sup>

#### WHAT IS "LABOR?"

Not all acts done on Sunday are "labor," and "servile labor" is not synonymous with "labor." Thus "a party may shave himself as he would take a bath or wash his face and it would not be understood as labor or work,"<sup>28</sup> and the meeting of a membership corporation not organized for commercial profit is not "labor."<sup>29</sup> In Texas it was held that the work of a district attorney is not "labor,"<sup>30</sup> and in Nebraska storekeeping is not "common labor."<sup>31</sup> While operating, managing

<sup>19</sup>See 53 AMERICAN LAW REV. 1.

<sup>20</sup>Soon Hing v. Crowley, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; People v. Klinck Pkg. Co., 85 Misc. Rep. 463, 148 N. Y. S. 940, affirmed in 164 App. Div. 97 and 214 N. Y. 121; Krieger v. State, 12 Okla. Cr. 566, 160 P. 36; State v. Graneman, *supra*, footnote 12.

<sup>21</sup>Brunswick-Balke-Collander Co. v. Evans, *supra*, footnote 17; State v. R. R., *supra*, footnote 18; McGatrick v. Wason, 4 Oh. St. 566; State v. Wertz, 91 W. Va. 622, 114 S. E. 242. See also cases cited *supra*, footnote 20.

<sup>22</sup>Elliott v. State, *supra*, footnote 12; Richmond v. Moore, 107 Ill. 429, 436; Bloom v. Richards, *supra*, footnote 12. See laws providing for one day of rest in seven, *infra*.

<sup>23</sup>State v. Smith, (Okla. Crim. 1921), 198 P. 879.

<sup>24</sup>Cahill's Revised Statutes, (1925), Ch. 38, § 573.

<sup>25</sup>State v. Reade (N. J. L. 1923), 121 A. 288.

<sup>26</sup>R. S. Mo. 1919, Sec. 3596.

<sup>27</sup>City of Canton v. Nist, 9 Oh. St. 439; State v. Somberg, 113 Neb. 761, 204 N. W. 788.

<sup>28</sup>State v. Wellott, 54 Mo. App. 310.

<sup>29</sup>In re Daughters of Israel Orphan Aid Soc., 125 Misc. Rep. 217, 210 N. Y. S. 541.

<sup>30</sup>Woods v. Terrell, 115 Tex. 569, 285 S. W. 293.

<sup>31</sup>State v. Somberg, *supra*, footnote 27.

and selling theatre tickets is "labor,"<sup>32</sup> operating a picture show is not "servile labor."<sup>33</sup>

The meaning of "labor" and such expressions is especially important in the baseball cases. In New Mexico it has been held that playing baseball is not "labor"<sup>34</sup> and the Tennessee statute prohibiting the "exercising of any of the common avocations of life" does not prohibit the playing of professional baseball.<sup>35</sup>

#### TEST AS TO WHAT IS AN ACT OF NECESSITY AND CHARITY

The usual test adopted by the courts in determining what is an act or work of "necessity" within the labor statutes is that laid down in 1849 by the Massachusetts court in the case of *Flagg v. Inhabitants of Millbury*:<sup>36</sup> "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity; but a moral fitness or propriety of the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute."<sup>37</sup>

In the more recent cases we find that the word "necessity" should be construed reasonably and neither too literally nor liberally;<sup>38</sup> the word "necessity" does not mean the same now (1922) as it did in 1779. Many things that were deemed luxuries then, or had no existence at all, are now deemed necessities.<sup>39</sup> The question must be determined according to the particular circumstances of each case, having regard also to the changing conditions of civilization.<sup>40</sup> "No doubt a thing which is merely useful or desirable to the residents of a town might be a necessity to the residents of a great city. So, also, that which was a luxury a century ago may have become a necessity now. There is always, however, a tendency which should not be sanctioned to claim accustomed luxuries as necessities, falling within the exception of the law."<sup>41</sup>

"Charity" as used in Sunday laws means everything which proceeds from a sense of moral duty or a feeling of kindness or humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure.<sup>42</sup>

<sup>32</sup> *Quarles v. State*, 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192; *City of Topeka v. Crawford*, 78 Kan. 583, 96 P. 862, 17 L. R. A. (N. S.) 1157, 16 Ann. Cas. 403; *City of Clinton v. Wilson*, *supra*, footnote 12.

<sup>33</sup> *State v. Smith*, *supra*, footnote 23. For discussion of "labor" see *Bloom v. Richards*, *supra*, footnote 12.

<sup>34</sup> *Territory v. Davenport*, 17 N. M. 214, 124 P. 795, 41 L. R. A. (N. S.) 407.

<sup>35</sup> *State v. Nashville Baseball Assn.*, 141 Tenn. 456, 211 S. W. 357.

<sup>36</sup> 4 Cush. 243.

<sup>37</sup> 37 Cyc. 552; 25 R. C. L. 1421; 27 AM. & ENG. ENCY. LAW (2nd Ed.) 399; *State v. Schatt*, 128 Mo. App. 622, 107 S. W. 10, and cases therein cited; *State v. R. R.* *supra*, footnote 18; *Hennersdorf v. State*, 25 Tex. App. 597, 8 S. W. 926.

<sup>38</sup> *State v. R. R.*, *supra*, footnote 18.

<sup>39</sup> *Pirkey Bros. v. Com.*, *supra*, footnote 12.

<sup>40</sup> *Natural Gas Prod. Co. v. Thurman*, *supra*, footnote 12.

<sup>41</sup> *State v. James*, 81 S. C. 197, 62 S. E. 214, 18 L. R. A. (N. S.) 617, 128 Am. St. Rep. 902, 16 Ann. Cas. 277; *State v. Smith*, *supra*, footnote 23.

<sup>42</sup> *Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 19 Am. Rep. 431. For other definitions, see WORDS AND PHRASES (first series), p. 1086.

## QUESTION OF LAW OR FACT

In most states the question as to whether a certain act is an act of necessity or charity so as to come within the exception to the Sunday law is one of fact for the jury to be determined from the circumstances of each case.<sup>43</sup> Some cases hold 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.<sup>44</sup> In a very few states the question is purely one of law.<sup>45</sup>

## WHAT ACTS DO AND DO NOT COME WITHIN THE EXCEPTION

Although some states are more strict than others in holding an act an act of necessity or charity, and although there is a tendency to become somewhat less strict as the years go by, the cases that have been decided under the various Sunday labor laws can fairly well be classified and reconciled. This is true provided due regard is had for the wording of the particular statute in each case. It is interesting to note just what particular acts have been held to have been acts of necessity or charity, and what acts have been held not to have been such a necessity or charity as to come within the exceptions.

Sale and Delivery of Food. Ordinarily, the sale and delivery of food is not an act of necessity and charity. Thus, the following did not come within the exception: selling meats;<sup>46</sup> traveling on Sunday to supply market with fresh meat on Monday;<sup>47</sup> ordinary sales or deliveries of ice or fresh meat in a town;<sup>48</sup> delivery of bread outside the premises of the baker;<sup>49</sup> and sales of ice cream, soda water or tobacco.<sup>50</sup> In Kansas the delivery of milk by a dairyman to his customers has been said to be a work of necessity.<sup>51</sup> In *Commonwealth v. London*<sup>52</sup> it was held that selling bread, butter, sandwiches, chocolate, and coffee was an act of necessity. The court considered the "Palace of Sweets" as

<sup>43</sup> Hooper v. Edwards, 18 Ala. 280; Johnson v. People, 42 Ill. App. 594; Ungericht v. State, 119 Ind. 379, 21 N. E. 1082, 12 Am. St. Rep. 419; Feitel v. Middlesex R. Co., 109 Mass. 398, 12 Am. Rep. 720; Spaith v. State, 10 Ohio Dec. Reprint 639, 22 Ohio L. J. 323; State v. Wertz, *supra*, footnote 21; Sullivan v. Maine Cent. R. Co., 82 Me. 196, 19 A. 169; State v. Petit, *supra*, footnote 12.

<sup>44</sup> Burns v. Moore, 76 Ala. 339, 52 Am. Rep. 332; State v. Frederick, 45 Ark. 347, 55 Am. Rep. 555; State v. Linsig, 178 Iowa 484, 159 N. W. 995; McCain v. State, 2 Ga. App. 389, 58 S. E. 550; State v. Schatt, *supra*, footnote 37; Pirkey v. Com., *supra*, footnote 12; McAfee v. Com., 173 Ky. 83, 190 S. W. 671, L. R. A. 1917C 377.

<sup>45</sup> Allen v. Duffie, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159.

<sup>46</sup> Arnheiter v. State, 115 Ga. 572, 41 S. E. 989, 58 L. R. A. 392. See Beal v. State, 9 Oh. App. 319.

<sup>47</sup> Jones v. Inhab. of Andover, 10 Allen 18.

<sup>48</sup> State v. James, *supra*, footnote 41.

<sup>49</sup> Com. v. McCarthy, 244 Mass. 484, 138 N. E. 835.

<sup>50</sup> State v. Wertz, *supra*, footnote 21; Oliveros v. Henderson, 116 S. C. 106, 106 S. E. 855; McAfee v. Com., *supra*, footnote 44; Ellis v. Town of Covington, 122 Va. 821, 94 S. E. 154.

<sup>51</sup> City of Topeka v. Hempstead, 58 Kan. 328, 49 P. 87.

<sup>52</sup> 149 Ky. 372, 149 S. W. 852.

a restaurant, although the indictment charged the owners with keeping a confectionery. This case should be received with caution, however, as a later Kentucky case<sup>53</sup> made it plain that the London case was decided on the ground that the defendants kept a restaurant.

Hotels and Restaurants. It is generally understood that keeping open hotels, boarding houses, and restaurants for the accommodation of the public is a work of necessity.<sup>54</sup>

Mail. Carrying mail on Sunday is an act of necessity.<sup>55</sup>

Agricultural Work. Where a farmer of little means, after having diligently and in good faith endeavored to save his grain, by circumstances beyond his control and which could not have been reasonably anticipated, finds himself on Saturday night in real danger of suffering a loss of one-third of his crop, running a reaper on Sunday is a work of necessity.<sup>56</sup> And as watermelons ripen so suddenly, the saving and getting into market a crop of them is a work of necessity.<sup>57</sup> So, the boiling down of maple sap where the sap is flowing freely,<sup>58</sup> and getting feed for hogs are works of necessity.<sup>59</sup> But in Arkansas, where the Sunday labor laws have always been strictly enforced, cutting wheat on Sunday by a poor man who could only borrow implements to use on Sunday did not come within the exception, the court saying, "The husbandman should look forward to the ripening of his grain as an event which must happen, and should make such timely provision for the harvest as not to violate the Sabbath."<sup>60</sup> And in Massachusetts, the exceptions did not cover the gathering of sea weed (for fertilizer) which had been washed ashore,<sup>61</sup> the gathering of cranberries when there was an unusually large crop,<sup>62</sup> nor the hoeing of crops in a field.<sup>63</sup>

Telephone and Telegraph. While sending a telegram regarding business that can be transacted as well on any other day is not a work of necessity or charity,<sup>64</sup> a telegram may be sent under such circumstances as to come within the exceptions. Thus, the notification of death by telegram,<sup>65</sup> a telegram telling time of arrival at deathbed,<sup>66</sup> asking doctor to

<sup>53</sup> McAfee v. Com., *supra*, footnote 44.

<sup>54</sup> 37 Cyc. 553, 27 AM. & ENG. ENCY. LAW (2nd Ed.) 400; McAfee v. Com., *supra*, footnote 44.

<sup>55</sup> Com. v. Knox, 6 Mass. 76. No doubt, under the Federal Constitution the states would be without jurisdiction to interfere in any way with the United States mail, no matter how the state statute was worded.

<sup>56</sup> Johnson v. People, *supra*, footnote 43.

<sup>57</sup> Wilkinson v. State, 59 Ind. 416.

<sup>58</sup> Morris v. State, 31 Ind. 189; Whitcomb v. Gilman, 35 Vt. 297.

<sup>59</sup> Edgerton v. State, 67 Ind. 588, 33 Am. Rep. 10.

<sup>60</sup> State v. Goff, 20 Ark. 289.

<sup>61</sup> Com. v. Sampson, 97 Mass. 407.

<sup>62</sup> Com. v. White, 190 Mass. 578, 77 N. E. 636.

<sup>63</sup> Com. v. Josselyn, 97 Mass. 411.

<sup>64</sup> Western U. Tel. Co. v. Hutcheson, 91 Ga. 252, 18 S. E. 297; Western U. Tel. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

<sup>65</sup> Western U. Tel. Co. v. Wilson, 93 Ala. 32, 9 So. 414, 30 Am. St. Rep. 23.

<sup>66</sup> Western U. Tel. Co. vs. Henley, *supra*, footnote 64.

attend sick person,<sup>67</sup> and one telling a wife when the husband would return,<sup>68</sup> are acts of necessity or charity.<sup>69</sup>

Traveling. Traveling to assist a sick friend,<sup>70</sup> driving employer's family to church,<sup>71</sup> and traveling to prepare breakfast for employer<sup>72</sup> are works of necessity or charity. Even riding on Sunday for exercise, and for no other purpose is not a violation of a Sunday statute which expressly excepts from its prohibition works of necessity or charity.<sup>73</sup>

Repairing the Highway. Repairing a defect in the highway which may endanger the limbs and lives of travelers is a work of necessity, according to *Flagg v. Millbury*,<sup>74</sup> which is the case so often cited for its definition of "necessity." In this leading case the court said. ". . . any work and labor necessary to be done to secure the public safety must come within the true meaning of the exception in the statute."<sup>75</sup> But in New York it was held otherwise.<sup>76</sup>

Public Service Corporations. The running of passenger trains on Sunday is a work of necessity in Kentucky,<sup>77</sup> but in Arkansas the fact alone that it is labor performed in the operation of railroad trains does not bring it within the exception.<sup>78</sup> In Missouri<sup>79</sup> and Maryland<sup>80</sup> carrying freight on Sunday is a work of necessity. The making of the ordinary repairs of a railroad track is not a work of necessity,<sup>81</sup> but where the work can be done only on Sunday without the delay of trains, the work is permitted.<sup>82</sup> Running of street railroads in cities and the vicinity thereof, where the same have been established, is a work of necessity.<sup>83</sup> To take care of goods on Sunday, and safely and securely keep them, after they have been received, is a work of necessity,<sup>84</sup> and the danger of navigation being closed may make it lawful to load a vessel on Sunday, if there is no other time to do so.<sup>85</sup> Of course gen-

<sup>67</sup> *Western U. Tel. Co. v. Griffin*, 1 Ind. App. 46, 27 N. E. 113.

<sup>68</sup> *Western U. Tel. Co. v. Fulling*, 49 Ind. App. 172, 96 N. E. 967; *Burnett v. Western U. Tel. Co.*, 39 Mo. App. 599.

<sup>69</sup> See *Twin Valley Tel. Co. v. Mitchell et al.*, 27 Okla. 388, 113 P. 914, 38 L. R. A. (N. S.) 235, Ann. Cas. 1912C 582, where the necessity of sending telephone messages was considered under another subject.

<sup>70</sup> *Doyle v. Lynn & B. R. Co.*, *supra*, footnote 42.

<sup>71</sup> *Com. v. Nesbit*, 34 Pa. 398.

<sup>72</sup> *Crosman v. City of Lynn*, 121 Mass. 301.

<sup>73</sup> *Sullivan v. Maine Cent. R. Co.*, *supra*, footnote 43. This case may have been decided on the ground that riding for exercise is not "labor." The report is not clear.

<sup>74</sup> *Supra*, footnote 36.

<sup>75</sup> *Accord*, *Alexander v. Town of Oshkosh*, 33 Wis. 277.

<sup>76</sup> *People v. Lynch*, 141 N. Y. S. 729, 156 App. Div. 601, 29 N. Y. Cr. 544.

<sup>77</sup> *Com. v. L. & N. R. R. Co.*, 80 Ky. 291, 44 Am. Rep. 475.

<sup>78</sup> *Barefield v. State*, 85 Ark. 134, 107 S. W. 393.

<sup>79</sup> *State v. R. R.*, *supra*, footnote 18.

<sup>80</sup> *Phila., W. & B. R. Co. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415.

<sup>81</sup> *L. & N. R. R. Co. v. Com.*, 92 Ky. 114, 17 S. W. 274, 13 Ky. Law Rep. 439.

<sup>82</sup> *Yonoski v. State*, 79 Ind. 393.

<sup>83</sup> *Augusta & S. R. R. Co. v. Renz*, 55 Ga. 126.

<sup>84</sup> *Powhatan S. Co. v. R. R.*, 24 How. 247-257, 16 L. Ed. 682.

<sup>85</sup> *McGatrick v. Wason*, *supra*, footnote 21.

erating steam for the purpose of supplying water and light to a town and its inhabitants is a work of necessity.<sup>86</sup>

**Public Officials and Lawyers.** Almost all work done by public officials, such as a district attorney,<sup>87</sup> a guard taking a prisoner to jail,<sup>88</sup> and a guard attending the penitentiary<sup>89</sup> is permitted as a necessity; and the return and receipt of a verdict is likewise lawful.<sup>90</sup> But the work of an assessor checking up the week's work,<sup>91</sup> and the services of an attorney in rearranging a partnership business,<sup>92</sup> do not come within the exception.

**Newspapers.** Publishing a newspaper is not an act of necessity or charity in New York,<sup>93</sup> nor in Minnesota,<sup>94</sup> but it is in Missouri.<sup>95</sup> Nor is selling newspapers,<sup>96</sup> or printing advertisements in a newspaper.<sup>97</sup>

**Barbering.** The barbers have been quite persistent in arguing that their labor is within the exceptions to the operation of Sunday labor laws, but it has always been held that the ordinary work of a barber is labor and is not ordinarily considered an act of necessity or charity.<sup>98</sup>

**Photographers.** The taking of pictures by a photographer in his studio is not a work of necessity or charity.<sup>99</sup>

**Garages and Filling Stations.** Repairing a driveway to a public garage does not come within the exception.<sup>100</sup> The legality of selling motor oil and gasoline on Sunday has generally arisen under closing statutes and not labor statutes, but as there should be no difference in construing the sales of these products under either of the laws, it can be said that such sales ordinarily are not acts of necessity or charity.<sup>101</sup>

<sup>86</sup> Turner v. State, 85 Ark. 188, 107 S. W. 388.

<sup>87</sup> Woods v. Terrell, *supra*, footnote 30.

<sup>88</sup> Fisher v. Kyle, 27 Mich. 454.

<sup>89</sup> Page v. O'Sullivan, 152 Ky. 703, 169 S. W. 542.

<sup>90</sup> Adams v. Cook et al., 91 Vt. 281, 100 A. 42.

<sup>91</sup> Stelhorn v. Bd. of Commrs., 60 Ind. App. 14, 110 N. E. 89.

<sup>92</sup> Jones v. Brantley, 121 Miss. 721, 83 So. 802.

<sup>93</sup> Smith v. Wilcox, 24 N. Y. 353.

<sup>94</sup> Hardy v. St. Paul Globe Pub. Co., 41 Minn. 188, 43 N. W. 872, 16 Am. St. Rep. 695, 4 L. R. A. 466.

<sup>95</sup> Pulitzer Pub. Co. v. McNichols, (Mo. 1915), 181 S. W. 1, L. R. A. 1916C 1148; overruling Publishers: Geo. Knapp & Co. v. Culbertson et al., 152 Mo. App. 147, 133 S. W. 55. See 6 ST. L. LAW REV. 57.

<sup>96</sup> Com. v. Matthews, 152 Pa. 166, 25 A. 548, 18 L. R. A. 761.

<sup>97</sup> Sentinal Co. v. Meiselbach Co., 144 Wis. 224, 128 N. W. 861, 32 L. R. A. (N. S.) 436, 140 Am. St. Rep. 1007.

<sup>98</sup> Petit v. Minnesota, *supra*, footnote 12; State v. Frederick, *supra*, footnote 44; McCain v. State, *supra*, footnote 44; Gray v. Com., 171 Ky. 269, 188 S. W. 354; State v. Linsig, *supra*, footnote 44; State v. Schuler, 10 Ohio Dec. 806, 23 WKLY. LAW BUL. 450; Com. v. Waldman, 140 Pa. St. 89, 21 A. 248, 11 L. R. A. 563; Ex parte Kennedy, 42 Tex. Cr. 148, 95 Am. St. Rep. 845, 60 L. R. A. 468; State v. Wellott, *supra*, footnote 28; State v. Schatt, *supra*, footnote 37; State v. Kuehner, (Mo. App. 1908) 110 S. W. 605. See State v. Granneman, *supra*, footnote 12.

<sup>99</sup> State v. Dean, 149 Minn. 410, 184 N. W. 275.

<sup>100</sup> Watkins v. City, 134 Miss. 556, 99 So. 363.

<sup>101</sup> Grimes v. State, 82 Tex. Crim. 512, 200 S. W. 378; see Rhodes v. City of Hope, (Ark. 1926), 286 S. W. 877, 12 ST. LOUIS LAW REVIEW 77.

Pictures Shows and Theatres. Labor expended in the operation of a picture show is not a necessity or charity;<sup>102</sup> not even where the show breaks the monotony of army life at a great army camp;<sup>103</sup> nor where the proceeds are given to charity.<sup>104</sup>

Construction of Building. The construction of a building is not an act of sufficient necessity to come within the exception.<sup>105</sup>

Swimming Pool. A recent case which went far in construing an act to be an act of necessity or charity is that of *Lakeside Inn Corp. v. Com.*,<sup>106</sup> which held that operating a swimming pool on Sunday where it tends to prevent disorder or indecent exposures by persons along streams is lawful.

Collecting Clothes for Laundry. The act of collecting clothes for a laundry is not an act of necessity or charity.<sup>107</sup>

Where Cessation of Operations Would Damage Product or Close Plant. In an early Pennsylvania case,<sup>108</sup> it was said that pumping an oil well when there was a flow of two barrels of salt water per day into it was not an act of necessity, but in a later West Virginia case pumping an oil well was justified on the ground that material permanent loss would come to the owner by not pumping it.<sup>109</sup> Repairing a mill on Sunday to prevent the suspension of operations on a week day was not an act of necessity or charity in Massachusetts<sup>110</sup> and New Hampshire<sup>111</sup> but in Arkansas<sup>112</sup> the repairing of a belt in a mill employing two hundred persons, which broke on Saturday and could not be repaired on that day was held to be justified. But in later Arkansas cases<sup>113</sup> it was said that it is only in case of extreme emergency that one is justified in disregarding the Sabbath in order to make preparations for work or to continue work begun on other days of the week. Instances in which Sunday work was allowed so as to prevent damaging product are the operation of an ice factory,<sup>114</sup> a plant for the manufacture of "carbon black"<sup>115</sup> and the turning of a heap of barley for the purpose of malting the same, when any neglect for twenty-four hours would spoil it.<sup>116</sup>

In Nature of Charity. All the necessary and usual work connected

<sup>102</sup> *State v. Kennedy*, (Mo. App. 1925), 277 S. W. 943; see *State v. Smith*, *supra*, footnote 23.

<sup>103</sup> *Rosenbaum v. State*, *supra*, footnote 18; *Capitol Theatre Co. v. Com.*, 173 Ky. 780, 199 S. W. 1076.

<sup>104</sup> *Rosenberg v. Arrowsmith*, 82 N. J. Eq. 570, 89 A. 524.

<sup>105</sup> *Lane v. State*, 68 Tex. Cr. 4, 150 S. W. 637.

<sup>106</sup> 134 Va. 696, 114 S. E. 769.

<sup>107</sup> *State v. Lavoie*, 78 N. H. 99, 97 A. 566.

<sup>108</sup> *Com. v. Funk*, (Quart. Sess.) 9 Pa. Co. Ct. 227.

<sup>109</sup> *State v. McBee*, 52 W. Va. 257, 43 S. E. 121, 60 L. R. A. 638.

<sup>110</sup> *McGrath v. Marwin*, 112 Mass. 467, 17 Am. Rep. 119.

<sup>111</sup> *Hamilton v. Austin*, 62 N. H. 575.

<sup>112</sup> *State v. Collitt*, 72 Ark. 167, 79 S. W. 791, 64 L. R. A. 204.

<sup>113</sup> *Shipley v. State*, 61 Ark. 216, 32 S. W. 489, 33 S. W. 107; *Wilson et al. v. State*, (Ark. 1916), 187 S. W. 937.

<sup>114</sup> *Hennersdorf v. State*, *supra*, footnote 37.

<sup>115</sup> *Natural Gas Prod. Co. v. Thurman*, *supra*, footnote 12.

<sup>116</sup> *Crockett v. State*, 33 Ind. 416.

with religious worship, including the soliciting or making of subscriptions to payment of the indebtedness of a church for the erection of its church building is permissible as a work of necessity or charity.<sup>117</sup>

“ONE DAY OF REST IN SEVEN” LAWS

The fact that much labor is permitted on Sunday because it is a work of necessity or charity has led to the development of the so-called “One Day of Rest in Seven” laws. Although the purpose of Sunday labor laws is to give everyone a day of rest because he needs it for his physical, intellectual, and moral welfare,<sup>118</sup> this has not been the result of the laws because certain persons are permitted to labor on the ground that the work is an act of necessity or charity, and for the reason that in some of the labor laws, such as that of Massachusetts,<sup>119</sup> certain work is expressly excepted from the operation of the laws. But as these people are no different physically and mentally from those who may not work on Sunday, laws providing for one day of rest in seven have been passed, whose purpose is to provide a day of rest for everyone.

Laws providing for one day of rest in seven now exist in a very few states, such as Massachusetts, New York, and California, and in Porto Rico. The Minnesota day of rest law was declared unconstitutional in 1925.<sup>120</sup> The laws of Massachusetts and New York are generally regarded as the best models for this type of legislation.

Massachusetts. The one day of rest law in Massachusetts should be read in connection with the old Sunday labor law,<sup>121</sup> which in the following section<sup>122</sup> makes numerous exceptions,<sup>123</sup> permitting much work on Sunday. To give those working on Sunday a day of rest, laws were passed in 1913.<sup>124</sup> As the Massachusetts day of rest law is regarded as a model, the important sections are given in the footnotes.<sup>125</sup>

<sup>117</sup> *Allen v. Duffie*, *supra*, footnote 45; *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.

<sup>118</sup> *Supra*, footnote 20.

<sup>119</sup> General Laws—1921, Ch. 136, Secs. 5 and 6.

<sup>120</sup> *Infra*, footnote 130.

<sup>121</sup> *Supra*, footnote 119, Sec. 5.

<sup>122</sup> Sec. 6.

<sup>123</sup> Following are some of the acts expressly permitted on Sunday under this section: the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the operation of motor vehicles; the use of the telegraph and telephone; the carrying on of the business of bootback before eleven o'clock in the forenoon; the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the preparation, printing and publication of newspapers, or the sale and delivery thereof; and several other acts, such as the sale of ice cream and soda water under certain conditions.

<sup>124</sup> General Laws—1921, Ch. 149, Sec. 47, *et seq.*

<sup>125</sup> “Sec. 47. Whoever, except at the request of the employee, requires an employee engaged in any commercial occupation or in the work of any industrial process not subject to the following section or in the work of transportation or

New York. The law providing for a day of rest in New York is very similar to that of Massachusetts,<sup>126</sup> with the exception of a certain section (c) which provides that the day of rest requirement shall not apply to "(c) Employees, if the board in its discretion approves, engaged in an industrial or manufacturing process necessarily continuous, in which no employee is permitted to work more than eight hours in any calendar day"; This section (c) is unconstitutional, but the rest of the New York law is constitutional.<sup>127</sup>

California. The law in California is short.<sup>128</sup>

Porto Rico. The code of Porto Rico on this subject is also short.<sup>129</sup>

Minnesota. The law in Minnesota provided that no person shall be employed in, or about, any mechanical or mercantile establishment, factory, foundry, laundry, power plant, or stationery boiler room or engine room, more than six days in any one week. There were many employees to whom the law did not apply, such as employees in hospitals, telephone or telegraph business, automobile garages, and places of public amusements. The act was held unconstitutional under Section 1 of the Fourteenth Amendment and also under the state constitution because it brought the employees of one establishment within the law and left those of another outside the law with no reasonable ground for not treating them alike and thus violated the equal protection clause. The court said, "No differences in conditions have been pointed out, and none occur to us, that suggest a legitimate reason for saying that

communication to do on Sunday the usual work of his occupation, unless he is allowed during the six days next ensuing twenty-four consecutive hours without labor, shall be punished by a fine of not more than fifty dollars; but this and the following section shall not be construed as allowing any work on Sunday not otherwise authorized by law.

"Sec. 48. Every employer of labor engaged in carrying on any manufacturing or mercantile establishment in the commonwealth shall allow every person, except those specified in section fifty, employed in such manufacturing or mercantile establishment at least twenty-four consecutive hours of rest in every seven consecutive days. No employer shall operate any such manufacturing or mercantile establishment on Sunday unless he has complied with section fifty-one. Whoever violates this section shall be punished by a fine of fifty dollars.

"Sec. 49. The two preceding sections shall not apply to establishments used for the manufacture or distribution of gas, electricity, milk or water, hotels, restaurants, drug stores, livery stables or garages, nor to the transportation, sale or delivery of food.

"Sec. 50. Sections forty-seven and forty-eight shall not apply to (a) janitors; (b) watchmen; (c) employees whose duties include no work on Sunday other than (1) setting sponges in bakeries, (2) caring for live animals, (3) maintaining fires, (4) caring for machinery; (d) employees engaged in the preparation, printing, publication, sale or delivery of newspapers; (e) farm or personal service; (f) any labor called for by an emergency that could not reasonably have been anticipated."

Sec. 51. (This section provides for posting of notices, etc. by those employing labor on Sunday).

<sup>126</sup> Cahill's Cons. Laws of New York, 1923, Ch. 32, Sec. 161, *et seq.*

<sup>127</sup> *People v. Klinck Pkg. Co.*, 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916D 1051. See other citations to this case, *supra*, footnote 20.

<sup>128</sup> General Laws of Calif. (1923), Act. 4718, Sec. 1.

<sup>129</sup> See ACTS AND RESOLUTIONS OF THE FIRST SESSION OF THE NINTH LEGISLATURE OF PORTO RICO, (1917) Act No. 26, pp. 272-273.

employees in hotels, bakeries, restaurants, factories, packing plants and machine repair shops shall have a day of rest, and that employees in places of amusements, newspaper plants, canneries, flour mills and automobile repair shops shall not."<sup>130</sup>

It is now practically impossible to enforce the Sunday labor laws as they exist in most of the states because of the great amount of labor that is performed in violation of the statutes, but which is approved by the people, and thus the laws have become a "dead letter" to a large extent. But if they were repealed, it might open the door to an equally undesirable state of affairs. The answer to the dilemma seems to be the laws providing for one day of rest in seven, to supplement the Sunday labor laws. But they must be worded carefully so as to be constitutional, as are the New York and Massachusetts statutes, and not unconstitutional, as is the Minnesota statute.

#### MISSOURI SUNDAY LAWS

Although Missouri has been referred to as being "open" on Sunday,<sup>131</sup> it is not because there are no laws, but because the existing laws are not enforced. Missouri has several Sunday laws, the most important being the one prohibiting labor,<sup>132</sup> and the one making it illegal to expose to sale any goods, wares or merchandise.<sup>133</sup>

The law in Missouri prohibiting Sunday labor, and excepting "household offices of daily necessity, or other works of necessity or charity," was passed by the legislature of Missouri Territory at the December session, 1813, and became effective on March 1, 1814.<sup>134</sup> It appears in the Revised Laws of the State of Missouri for 1825,<sup>135</sup> and has appeared in almost the same words in every revision of the statutes down

<sup>130</sup> State v. Pocock, 161 Minn. 376, 201 N. W. 610. See "The Minnesota Decision on the Law for One Day's Rest in Seven," AMERICAN LABOR LEG. REV., Dec. 1924.

<sup>131</sup> See "Our Sunday and Anti-Sunday Laws," LITERARY DIGEST, Sept. 12, 1925.

<sup>132</sup> R. S. Mo. 1919, Sec. 3596. "Every person who shall either labor himself, or compel or permit his apprentice or servant, or other person under his charge or control, to labor or perform any work other than the household offices of daily necessity, or other works of necessity or charity, or who shall be guilty of hunting game or shooting on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor and fined not exceeding fifty dollars."

Sec. 3597. "The last section shall not extend to any person who is a member of a religious society by whom any other than the first day of the week is observed as a Sabbath, so that he observes such Sabbath, nor to prohibit any ferryman from crossing passengers on any day of the week; nor shall said last section be extended or construed to be an excuse or defense in any suit for the recovery of damages or penalties from any person, company or corporation voluntarily contracting or engaging in business on Sunday."

<sup>133</sup> R. S. Mo. 1919, Sec. 3599. "Every person who shall expose to sale any goods, wares or merchandise, or shall keep open any ale or porter house, grocery or tipping shop, or shall sell or retail any fermented or distilled liquor on the first day of the week, commonly called Sunday, shall, on conviction, be adjudged guilty of a misdemeanor and fined not exceeding fifty dollars."

Sec. 3600. "The last section shall not be construed to prevent the sale of any drugs or medicines, provisions or other articles of immediate necessity."

<sup>134</sup> See A DIGEST OF THE LAWS OF MISSOURI TERRITORY, (1818), by Henry S. Geyer, pp. 426-427.

<sup>135</sup> P. 310.

to date.<sup>136</sup> The law is constitutional.<sup>137</sup> Although few cases involving violations of this statute have been appealed to the higher courts in the last few years, the courts are of course bound to recognize the existence of the law and enforce it. Thus, in December 1925 it was held that labor performed in the operation of a picture show, selling tickets, and requesting and permitting persons under the management thereof to operate a picture machine and piano was in violation of the statute and a conviction was upheld.<sup>138</sup> So, we still have a Sunday labor law in Missouri, which has been in existence since the State was admitted to the Union in 1821.

Under this law, it was held that the carrying of freight on Sunday<sup>139</sup> and the publishing of a newspaper<sup>140</sup> are lawful as being acts of necessity; while barbering,<sup>141</sup> working in a stove and saw mill,<sup>142</sup> and operating a picture machine and piano at a picture show<sup>143</sup> are not works of necessity, and the performance of such labor was in violation of the statute. The telephone and telegraph are now probably considered as necessities.<sup>144</sup> In 1900 the Supreme Court said that there was no law in Missouri which prevents the playing of a game of baseball on Sunday.<sup>145</sup> This case, however, arose under the statute prohibiting horse-racing, cock-fighting, or playing at cards or games of any kind on Sunday,<sup>146</sup> and the court probably did not have to consider whether playing baseball was "labor." As the Missouri Constitution prohibits a special law where a general law can be made applicable,<sup>147</sup> the Act of 1895 making it a misdemeanor to carry on the business of barbering on Sunday was held unconstitutional.<sup>148</sup> Since that time, as before, barbering on Sunday has been held to have been "labor" and not necessarily an act of necessity or charity and therefore prohibited under the general Sunday labor law.<sup>149</sup> There are no doubt many acts done on Sunday in this state, especially in the larger cities that clearly violate the existing labor law and cannot be justified as acts of necessity or charity,<sup>150</sup> or as permissible under Sec. 3597.<sup>151</sup>

Inasmuch as in the absence of statute all acts except judicial acts are valid on Sunday<sup>152</sup> and the Missouri labor law does not prohibit or make void the execution of contracts on that day, contracts executed on Sun-

<sup>136</sup> R. S. Mo. 1919, Sec. 3596.

<sup>137</sup> *State v. Ambs*, 20 Mo. 214.

<sup>138</sup> *State v. Kennedy*, *supra*, footnote 102.

<sup>139</sup> *State v. R. R.*, *supra*, footnote 18.

<sup>140</sup> *Pulitzer Pub. Co. v. McNichols*, *supra*, footnote 95.

<sup>141</sup> See Mo. cases cited in footnote 98.

<sup>142</sup> *Barney v. Spangler*, 131 Mo. App. 58, 109 S. W. 855.

<sup>143</sup> *State v. Kennedy*, *supra*, footnote 102.

<sup>144</sup> See *Pulitzer Pub. Co. v. McNichols*, *supra*, footnote 95.

<sup>145</sup> *Ex parte Neet*, 157 Mo. 527, 57 S. W. 1025, 80 Am. St. Rep. 638; overruling *State v. Williams*, 35 Mo. App. 541.

<sup>146</sup> Now R. S. Mo. 1919, Sec. 3598.

<sup>147</sup> Art. 4, Sec. 53.

<sup>148</sup> *State v. Granneman*, *supra*, footnote, 12.

<sup>149</sup> See Mo. cases cited in footnote 98.

<sup>150</sup> For discussion of "necessity" see *State v. R. R.*, *supra*, footnote 18.

<sup>151</sup> *Supra*, footnote 132.

<sup>152</sup> *Supra*, footnote 11. See also, *Moore v. Clymer*, 12 Mo. App. 11.

day are valid and may be enforced in the courts.<sup>153</sup> Thus, contracts for the exchange of realty;<sup>154</sup> the execution of a deed;<sup>155</sup> and the execution of a promissory note<sup>156</sup> are not invalid because executed on Sunday. For the same reason a check drawn on Sunday is no doubt valid. Likewise, because neither the Missouri Constitution nor the Sunday laws prohibit legislative acts on Sunday, reading a bill on Sunday is not a nullity.<sup>157</sup> The meeting of arbitrators on Sunday is not unlawful, but if the award is made on Sunday it is illegal, as being a judicial act and within the prohibition of the statute<sup>158</sup> that no court shall be open on Sunday unless it be for the purpose of receiving a verdict or discharging a jury.<sup>159</sup>

Although contracts made on Sunday are not void because made on that day,<sup>160</sup> a person cannot recover for contracts growing out of the violation of the Sunday labor law. Thus it has been held that an employe in a stove and saw mill was barred from recovering for work done,<sup>161</sup> and a leader of a band which played at a beer garden in St. Louis was also not permitted to recover.<sup>162</sup> The law on this matter would be perfectly clear if it were not for the fact that Sec. 3597 contains a phrase to the effect that the violation of the labor law shall not be an excuse or defense in any suit for the recovery of damages from persons voluntarily doing business on that day.<sup>163</sup> In the case of *Pulitzer Pub. Co. v. McNichols*<sup>164</sup> the St. Louis Court of Appeals carefully considered the reasons for this amendment, which was added in 1889, and came to the conclusion that the phrase was not intended to be confined to action *ex delicto*, but applies as well as actions arising upon contracts. And therefore, the defendant when he was sued for advertising was precluded from setting up the violation of the labor law by the newspaper as a defense. But this case was certified to the Supreme Court, as being in conflict with *Knapp & Co. v. Culbertson*,<sup>165</sup> and the honorable court based its decision solely on the ground that publishing a newspaper is a work of necessity, and did not consider the effect of Sec. 3597.<sup>166</sup> In a later case, in 1924, the Supreme Court, by way of *dictum*, said that "contracts growing out of the violation of the provisions of the statute (R. S. Mo. 3596) are void and will not be enforced by the courts."<sup>167</sup> The saw mill case<sup>168</sup> and the beer garden case<sup>169</sup>

<sup>153</sup> *Roberts v. Barnes et al.*, 127 Mo. 405, 30 S. W. 113, 48 Am. St. Rep. 640.

<sup>154</sup> *Glitzke v. Ginsberg*, (Mo. 1924), 258 S. W. 1004.

<sup>155</sup> *Roberts v. Barnes et al.*, *supra*, footnote 153.

<sup>156</sup> *Kaufman v. Hamm*, 30 Mo. 387; *Glover v. Cheatham*, 19 Mo. App. 656.

<sup>157</sup> *Ex parte Seward*, 299 Mo. 385, 253 S. W. 356, 31 A. L. R. 665. Writ of error dismissed, *Seward v. Brady*, 44 S. Ct. 335, 264 U. S. 599.

<sup>158</sup> R. S. Mo. 1919, Sec. 2358. See also Sec. 2732.

<sup>159</sup> *Karapschinsky v. Rothbaum*, 177 Mo. App. 91, 163 S. W. 290.

<sup>160</sup> *Supra*, footnote 153.

<sup>161</sup> *Barney v. Spangler*, *supra*, footnote 142.

<sup>162</sup> *Bernard v. Luepping*, 32 Mo. 341.

<sup>163</sup> *Supra*, footnote 132. See *Bassett v. Tel. Co.*, 48 Mo. App. 566.

<sup>164</sup> 170 Mo. App. 709, 153 S. W. 562.

<sup>165</sup> *Supra*, footnote 95.

<sup>166</sup> *Pulitzer Pub. Co. v. McNichols*, (Mo. 1915), 181 S. W. 1, L. R. A. 1916C 1148.

<sup>167</sup> *Glitzke v. Ginsberg*, *supra*, footnote 154.

<sup>168</sup> *Supra*, footnote 162.

<sup>169</sup> *Supra*, footnote 161.

are cited as authority, and therefore the present status of the law seems to be that suits cannot be maintained to recover on contracts growing out of violations of the Sunday labor law.

R. S. Mo. 1919, Sec. 3599 prohibits the exposing to sale of goods on Sunday<sup>170</sup> and the following section (Sec. 3600) excepts sales of drugs or medicines, provisions or other articles of immediate necessity. Under these statutes the sale of tobacco on Sunday is unlawful,<sup>171</sup> as is exposing for sale, and selling groceries, meats and feed, unless the necessity for them is urgent and immediate. The "necessity" spoken of in Sec. 3600 must be of such character that it could not reasonably have been foreseen or guarded against.<sup>172</sup> Selling lemons was approved as being both a medicine and a food and within Sec. 3600.<sup>173</sup> In view of the statutes prohibiting the exposing to sale of goods, and the fact that the "necessity" must be urgent and immediate, there is, no doubt, much goods sold in Missouri on Sunday in violation of the law.

The law prohibiting sales of goods on Sunday makes no exception for members of a religious society by whom some other day of the week is observed, whereas the Sunday labor law makes such an exception (in Sec. 3597).<sup>174</sup>

It seems that the general laws in Missouri making it unlawful to labor or sell goods on Sunday are as strict as those of any state. At the present time, the laws of Massachusetts pertaining to labor and sales are more liberal than those of Missouri, although the former state is generally regarded as a "Blue Law" state. In Massachusetts, the sale of ice cream, tobacco and some other goods is expressly made lawful, and even bootblacks may labor until eleven o'clock on Sunday,<sup>175</sup> whereas in Missouri to be lawful the labor must be "necessity or charity," or performed in the operation of ferry boats, or performed by one observing another day;<sup>176</sup> and the sales must be of "drugs or medicines, provisions or other articles of immediate necessity."<sup>177</sup>

C. SIDNEY NEUHOFF.

## RIGHT OF WOMEN TO SERVE ON JURIES IN MISSOURI\*

You have asked us for our opinion on the question whether, in order to qualify women for jury service in Missouri, it will be necessary first to obtain an amendment to the State Constitution, or whether the result can be accomplished without an amendment to the Constitution and only by Legislation.

The question whether a Constitutional amendment is necessary arises

<sup>170</sup> *Supra*, footnote 133.

<sup>171</sup> *State v. Ohmer*, 34 Mo. App. 115.

<sup>172</sup> *State v. Hogan*, 212 Mo. App. 473, 252 S. W. 90.

<sup>173</sup> *State v. Campbell*, 206 Mo. 579, 105 S. W. 637.

<sup>174</sup> *State v. Hogan*, *supra*, footnote 172.

<sup>175</sup> See Massachusetts General Laws—1921, Ch. 136, Sec. 6.

<sup>176</sup> *Supra*, footnote 132.

<sup>177</sup> *Supra*, footnote 133.

\*This article was written by E. M. Grossman, and George A. McNulty in response to a request by the Missouri League of Women Voters for an opinion on the question.