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SUNDAY LAWS-ILLEGALITY OF SUNDAY CONTRACTS

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SUNDAY LAWS—ILLEGALITY OF SUNDAY CONTRACTS—The concept of the Sabbath, the setting apart of one day in seven as a day of rest, was derived from the Mosaic code, the Fourth Commandment directs abstention from labor on the seventh day of the week, and although there is nothing in the New Testament relating to Sunday, the Christian world adopted the first day of the week as a day of rest. Constantine, by an edict in 321 A.D., ordered the suspension on Sunday of all business in the courts of law, except the manumission of slaves, and all other business except agricultural labor.¹

At common law no act otherwise lawful is forbidden on Sunday nor is any act made void for having been performed on that day.² Although an earlier act³ imposed a limited prohibition by making it an offense for butchers to sell meat on Sunday, English statutory restrictions on Sun-

¹ *McPherson v. Village of Chebanse*, 114 Ill. 46, 28 N.E. 454 (1885). See *Rosenbaum v. State*, 131 Ark. 251, 199 S.W. 388 (1917), for further historical background.

² *Bentram & Maupin v. Morgan*, 173 Ky. 655, 191 S.W. 317 (1917). See 60 C.J., Sunday, §17. At common law certain judicial acts done on Sunday were void, see 94 L.J. (N.S.) 141-2 (1944).

³ 3 Car. 1, c. 2 (1627).

day labor date from the Sunday Observance Act of 1677,⁴ the language of which has been embodied in a number of state statutes. In America, beginning as early as 1617,⁵ all the colonies adopted Blue Laws,⁶ regulating Sunday behavior. These are another source of present day Sunday laws. Remaining today on most state statute books are laws prescribing limits on Sunday activities, though the emphasis has been changed from that of prescribing devotional duties to that of making Sunday a day of rest free from the disturbance of labor and business.

1. *General Survey of Legislation*⁷

The legislation now in effect takes a variety of forms, though certain uniformities recur. With but three exceptions, the statutes are silent as to any specific effect on Sunday contracts. Statutes in Alabama⁸ and Maine⁹ declare them void; on the contrary, in West Virginia,¹⁰ "no contract shall be deemed void because it is made on Sunday." Six states¹¹ have statutes following the wording of the English Sunday Observance Act,¹² prescribing against work of one's "ordinary calling."

⁴ 29 Car. 2, c. 7.

⁵ Campbell, "Should the Sunday Laws of our Country Be changed to Meet the Demands of our Cosmopolitan Population?" 10 VA. L. REG. 682 at 684 (1904).

⁶ See RANDALL, OLD-TIME BLUE LAWS (18), for an interesting collection of the old laws compared with some of the laws of the late 19th century.

⁷ It is to be noted that only the acts of state legislatures have been considered, and that Sunday activities may be further restricted by local ordinances, as expressly provided for in Wyo. Rev. Stat. Ann. (Courtright, 1931) §22-1427, Twelfth: "The town council of any such town . . . shall have the [power] . . . to close all places of business on the Sabbath day. . . ." Apart from express statutory authorization, local legislation of this type would probably be valid everywhere. 60 C.J. Sunday, §8. *Contra*, *City of Mt. Vernon v. Julian*, 369 Ill. 447, 17 N.E. 52, 119 A.L.R. 747 (1938).

⁸ Ala. Code (1940) tit. 9, § 21—"All contracts made on Sunday . . . [with certain exceptional] . . . are void."

⁹ Me. Rev. Stat. (1944) c. 100, §153—"No deed, contract, receipt, or other instrument in writing is void because dated on the Lord's Day, without other proof than the date of its having been made and delivered on that day." See *First Nat. Bank of Bar Harbor v. Kingsley*, 84 Me. 111 (1891).

¹⁰ W. Va. Code Ann. (Michie, 1943) § 6073.

¹¹ Ga. Code Ann. (Park, 1935) § 26-6905; Ind. Ann. Stat. (Burns, 1933) § 10-4301, is somewhat broader, "Whoever . . . is found [on Sunday] at common labor, or engaged in his usual vocation. . . ." Under this statute a sale of merchandise is common labor, *Voglesong v. State*, 9 Ind. 112 (1857); N.H. Rev. Laws (1942) c. 448, § 3; N.C. Gen. Stat. Ann. (Michie, 1943) c. 103-1; R.I. Gen. Laws Ann. (1938) c. 610, § 18; S.C. Code Ann (1942) § 1732.

¹² *Supra*, note 6. The act provides that no tradesman, artificer, workman, laborer, or other person whatsoever shall do or exercise any worldly labor, business or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted), and make it an offense to do so.

In fourteen states¹³ labor on Sunday is prohibited. Fifteen states,¹⁴ comprising a fair sampling of financial and industrial America, have enacted the broadest type of restriction, forbidding labor and business (or, in the alternative, selling) on Sunday. Eight states¹⁵ have statutes aimed at the prevention of public business; and seven of the western states¹⁶ have no definite restrictions on Sunday behavior. (It is to be noted that these categories are not mutually exclusive.)

In the seven states¹⁷ which have rejected this tenacious vestige of puritanism, and in West Virginia where Sunday contracts are specifically declared to be valid, there is no problem germane to the present purpose; on the other hand, in two states¹⁸ Sunday contracts are explicitly invalidated. But what of the effect on Sunday contracts in states falling within the twilight zone between these two extremes? These statutes, although differing as to specific restrictions, have basic similarities. Typically they except works of necessity and charity; as to the term "necessity" especially, a separate study could be launched to suggest its wide coefficient of elasticity.¹⁹ The great majority of

¹³ Colo. Stat. Ann. (Michie, 1935) c. 48, § 269; Fla. Stat. Ann. (1944) § 855.01; Ill. Ann. Stat. (Smith-Hurd, 1934) c. 38, § 549; Kan. Gen. Stat. Ann. (Corrick, 1935) § 21-952; Ky. Rev. Stat. (1944) § 436.160; Md. Ann. Code (Flack, 1939) art. 27, § 560; Mo. Stat. Ann. (1939) § 4739; Neb. Rev. Stat. (1943) § 28-940; N.M. Stat. Ann. (1941) § 41-4402; N.Y. Penal Laws (McKinney, 1944) § 2143; Ohio Gen. Code (Page, 1939) § 13044; Tex. Penal Code (Vernon, 1938) art. 283; Va. Code Ann. (Michie, 1942) § 4570; W. Va. Code Ann. (Michie, 1943) § 6072.

¹⁴ Ark. Dig. Stat. (Pope, 1937) c. 42, § 3418 et seq.; Conn. Gen. Stat. (Supp. 1939) § 1452e; Del. Rev. Code (1935) § 5253; Iowa Code (Reichmann, 1939) c. 596, § 13227; Me. Rev. Stat. (1930) c. 135, § 39; Mass. Ann. Laws (1932) c. 136, § 5; Mich. Stat. Ann. (1937) § 18.851; Miss. Code Ann. (1942) § 2368; N.J. Rev. Stat. (1937) § 2:207-1; Okla. Stat. Ann. (1941) tit. 21, §§ 907, 908; Pa. Stat. Ann. (Purdon, 1945) tit. 18, § 4699.4; S.D. Code Ann. (1939) § 65.0464; Tenn. Ann. Code (Michie, 1934) § 5253; Vt. Pub. Laws (1933) § 8706; Wash. Rev. Stat. Ann. (Remington, 1932) § 2494.

¹⁵ Cal. Political Code (Deering, 1944) § 10; Idaho Code Ann. (1932) § 17-2503; La. Crim. Code (Dart, 1943) § 1174; Minn. Stat. (Mason, 1927) § 10235; Mo. Rev. Stat. Ann. (1939) § 4742; Ohio Gen. Code (Page, 1939) § 13044; Tex. Penal Code (Vernon, 1938) art. 286; Utah Code Ann. (1943) § 103-53-1.

¹⁶ Ariz. Code Ann. (1939) § 43-5301; Mont. Rev. Code Ann. (Anderson & McFarland, 1935) § 11039; Nev. Comp. Laws (Hillyer, 1929) § 8412; North Dakota (no Sunday laws at all); Ore. Comp. Laws Ann. (1940) § 65-101; Wis. Stat. (1945) § 351.50; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 22-1427 (refers the problem to town councils). The statutory citations refer to Sunday laws but the type of restrictions declared are not pertinent to the present problem.

¹⁷ Arizona, Montana, Nevada, North Dakota, Oregon, Wisconsin and Wyoming.

¹⁸ Alabama and Maine.

¹⁹ See work of necessity within Sunday laws as a question of law or of fact, 29 A.L.R. 1928 (1924).

these statutes prescribe a fine as the penalty of infraction. This fine is usually ridiculously small, in many instances a dollar. A smaller number of states declare the desecrator of the Sabbath guilty of a misdemeanor. And the remainder merely state a direct prohibition without prescribing the results of disobedience. But in none of these three subcategories are the civil consequences of Sunday contracts spelled out. Despite the variations in forbidden acts under the various statutes, the courts have shown considerable uniformity in deciding the question of validity of Sunday contracts,²⁰ by applying the notions developed with reference to the effects of illegal bargains in general.²¹ If the act of contracting is illegal, the resultant engagements are invalid.²² The wording of each individual statute determines the scope of prohibition: the making of contracts on Sunday is not prohibited under statutes forbidding servile labor or working;²³ nor, if the contract is out of the usual line of one's employment, by statutes forbidding business in the exercise of one's ordinary calling;²⁴ nor, if the contract is privately made, by statutes forbidding labor which disturbs others or forbids public business.²⁵ With such exceptions, Sunday contracts are considered void in the majority of the states.²⁶

2. *Elements of a "Sunday" Contract*

There remain some difficulties in determining what constitutes a Sunday contract. If both the offer and acceptance are made on a Sunday, it is clearly a Sunday contract; but either one occurring on a secular day usually preserves the agreement.²⁷ It has been held that delivery on Sunday renders the contract one made on that day.²⁸ Also under the penumbra is a contract calling for performance on a Sunday;²⁹ but this differs from the situation where performance is fixed by a lapse of a period of time which ends on Sunday, where the general view is that the contract is performable on the next business day and not illegal.³⁰ Since the only illegality in the bargain made on a Sunday is in

²⁰ 2 CONTRACTS RESTATEMENT, introductory note to § 538, p. 1039 (1932).

²¹ Cook, "Rescission of Bargains Made on Sunday," 13 N.C. L. REV. 165 (1935).

²² 60 C.J., Sunday, § 65.

²³ *Merritt v. Earle*, (N.Y. S. Ct. 1859) 31 Barb. 38.

²⁴ *Sanders v. Johnson*, 29 Ga. 526 (1859).

²⁵ *Richmond v. Moore*, 107 Ill. 429 (1883). See 5 LA. L. REV. 626 (1944), for note on case under Louisiana Sunday statute. See also 7 J. MARSH. L. Q. 561 (1942).

²⁶ 2 CONTRACTS RESTATEMENT, introductory note to § 538, p. 1039 (1932).

²⁷ See cases cited in 6 WILLISTON, CONTRACTS, rev. ed., § 1701, footnote 3 (1938).

²⁸ *Anderson v. Bellinger*, 87 Ala. 334, 6 S. 82 (1888).

²⁹ *Carson v. Calhoun*, 101 Me. 456, 64 A. 838 (1906).

³⁰ 2 CONTRACTS RESTATEMENT, § 538 (2) (1932); Uniform Negotiable Instruments Law, §§ 85, 194.

the making of the agreement, not in the acts to be done,³¹ most courts hold that a contract, invalid at its inception, cannot be subsequently validated by ratification on a secular day.³² Some courts³³ seek to distinguish Sunday contracts from other illegal bargains and acknowledge the validity conferred by subsequent ratification, reasoning that the illegality relates only as to the time of execution, and does not penetrate to the subject-matter involved.³⁴ But in the majority of jurisdictions the contract is void at the outset and cannot be validly ratified.³⁵ However, the stringency of this view is sometimes modified by calling what would appear to be a ratification, a new contract made on a subsequent week day, even though with reference to the same subject-matter.³⁶ Where all the terms of a contract are agreed upon on Sunday but a contract is not to be deemed binding until reduced to writing and signed, which is subsequently done on a week day, there is still this split of authority;³⁷ but it would seem that preceding oral negotiations made on Sunday do not invalidate a written contract subsequently made on a secular day.³⁸

3. *Effect of Illegality*

Where the Sunday contract is considered illegal, the courts have usually applied the rules developed in regards to illegal contracts generally.³⁹ No action is maintainable on the contract; the courts will not enforce an executory agreement, nor avoid an executed one.⁴⁰ The

³¹ Cook, "Rescission of Bargains Made on Sunday," 13 N.C. L. REV. 165 (1935).

³² See the extensive review of the cases in 68 A.L.R. 1487 (1930).

³³ See cases listed in 6 WILLISTON, CONTRACTS, rev. ed., § 1707, note 1, (1938); and 68 A.L.R. 1487 (1930); Sioux Falls Motor Co. v. Styke, 58 S.D. 101, 235 N.W. 111 (1931).

³⁴ Campbell v. Young, 72 Ky. (9 Bush) 240 (1872).

³⁵ This is the view adopted in the 2 CONTRACTS RESTATEMENT, § 539 (1932). See cases listed in 6 WILLISTON, CONTRACTS §1707, note 2 (1938); 68 A.L.R. 1487 (1930); Silver v. Shulman, 213 Mich. 211, 181 N.W. 1006 (1921).

³⁶ Harrison v. Colton, 31 Iowa 16 (1870); Catsman v. Mack Int. Motor Truck Co., 266 Mich. 542, 254 N.W. 199 (1934).

³⁷ Compare Stamps v. Frost, 174 Miss. 325, 164 S. 584 (1935), with Moseley v. Vanhooser, 74 Tenn. 286 (1880), where under substantially identical statutes, the Mississippi court held the contract void, while the Tennessee court held it valid.

³⁸ Tyler v. Waddingham, 58 Conn. 375, 20 A. 335 at 395 (1800), "The mere fact that a contract grows out of a transaction which took place on Sunday will not render it void."

³⁹ These are summarized in 2 CONTRACTS RESTATEMENT, §§ 598 et seq. (1932). See also Williams, "The Legal Effect of Illegal Contracts," 8 C.A.M.B. L. J. 51 (1942).

⁴⁰ Williams v. Armstrong, 130 Ala. 389, 30 S. 553 (1900); Bertram & Maupin v. Morgan, 173 Ky. 655 at 661, 191 S.W. 317, L.R.A. 1917D 445 (1917), "... the great weight of authority is to the effect that an action arising out of a contract made on Sunday cannot be maintained in a court of law or equity, either to enforce its performance or compel its rescission. . . ."

typical statement in this respect is that the "law will leave the parties where their illegal transaction left them,"⁴¹ and this is applicable where the action is on the implied premise,⁴² or for redress on a bargain induced by fraud.⁴³ Especially where the relief sought is rescission and restitution, this "hands-off" attitude of the courts results in seemingly inequitable consequences, the oft-cited case of *Thompson v. Williams*⁴⁴ serving as an excellent example.⁴⁵ The result will differ according to the extent of invalidity imputed to the transaction by the court, and to the extent that the parties have already acted. Under the view of the vast majority of the courts, the usual consequences of a valid transaction ensue, but the contract is void; thus possession can be transferred, but no remedies on the contract are available.⁴⁶ If mutual exchanges have been made, neither party can recover his property or payment, even though that which he received is tendered. If performance has been on one side only, the buyer can retain possession of the goods without liability for the price; or if the price has been paid without delivery of the goods, such payment is lost. If the seller retake his property, the buyer can sue for the wrong, for his action is based on his possessory rights, and cannot enforce the unenforceable contract.⁴⁷ On the other hand, a few courts hold not only the contract itself but the transfer effected under it to be void; recovery of property or payment can be gained by tendering that which was received in exchange, and if still executory, the payments or exchanged property can be recovered.⁴⁸

⁴¹ *Foster v. Wooten*, 67 Miss. 540 (1890), quoted in *Bertram & Maupin v. Morgan*, *id.* at 661.

⁴² 2 CONTRACTS RESTATEMENT, § 598, comment c (1932).

⁴³ *Grant v. McGrath*, 56 Conn. 333, 15 A. 370 (1888).

⁴⁴ 58 N.H. 248 (1878).

⁴⁵ The seller sued the buyer in assumpsit for the price of two cows, sold and delivered to the defendant on Sunday, to be paid for later. Some time after the delivery of the cows the seller had taken the cows from the buyer because of his refusal to pay for them. The buyer then sued the seller in an action of trespass and, in spite of the fact that the buyer had never paid for the cows, recovered and collected a judgment for their value, the jury fixing the damages at the contract price agreed upon when the illegal bargain was made. It was held that even though the buyer had in the trespass action claimed title to the cows, the seller could not recover in the assumpsit action. See the discussion of the case in Cook, "Rescission of Bargains Made on Sunday," 13 N.C. L. REV. 165 (1935).

⁴⁶ See cases cited in 6 WILLISTON, CONTRACTS, rev. ed., § 1703 (1938); "Cases on Remedies," 2 DUFFEE AND DAWSON, RESTITUTION AT LAW AND IN EQUITY, 835, note (1939).

⁴⁷ *Kinney v. McDermot*, 55 Iowa 674, 8 N.W. 656 (1881).

⁴⁸ *Tucker v. Mowrey*, 12 Mich. 378 (1864), which rejects the views urged by learned counsel for the defendant, *Thomas M. Cooley*; *Winfield v. Dodge*, 45 Mich. 355, 7 N.W. 906 (1881); *Rott v. Goldman*, 236 Mich. 261, 210 N.W. 335 (1926). See 6 WILLISTON, CONTRACTS, rev. ed., § 1702 (1938).

As to the majority view, "The ground upon which courts have refused to maintain actions on contracts made in contravention of statutes for the observance of the Lord's day is the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction."⁴⁹ This general principle was long ago stated by Lord Mansfield,⁵⁰ in language still quoted, and has been adopted in the *Restatement*.⁵¹

The injustices produced by this view⁵² have evoked expressions of protest,⁵³ but little corrective response from the courts. In the minority camp, the Michigan decisions,⁵⁴ although resulting in apparently fairer treatment of the parties' interests, skirt the real issue of illegality and run into the problem of transfers to bona fide purchasers before recovery is asked.⁵⁵ A recent Tennessee⁵⁶ case involved a prospective purchaser of real estate seeking to recover the "earnest money" payment made on a contract for the purchase of real estate entered into on a Sunday. The defendant's sole contention was that since the contract was illegal and void and was an executed one, the court would aid neither party in an effort to enforce any right thereunder. Admitting this to be the general rule, the court said that from motives of public policy, "Relief may be granted a party equally guilty with his opponent, not only by cancelling an executory agreement, but even by setting aside an executed one and decreasing the recovery back of money paid in performance thereof."⁵⁷ But the court determined the contract in question to be executory, the payment of "earnest money" being a collateral incident to the principal agreement, so that the plaintiff could disaffirm and recover any money paid thereunder, even in a court of law; "the relief is given to the public through the party."⁵⁸ The court

⁴⁹ *Bertram & Maupin v. Morgan*, 173 Ky. 655 at 659, 191 S.W. 317, L.R.A.-1917D 445 (1917).

⁵⁰ *Holman v. Johnson*, 1 Cowp. 343, 98 Eng. Rep. 1120 (1776).

⁵¹ 2 CONTRACTS RESTATEMENT, § 512, defining illegality, and §§ 598 et seq. (1932), summarizing the effect.

⁵² The simple consumer-retailer transactions, where cash is exchanged for groceries, are unaffected by the Sunday laws, but they apply with drastic effect to bigger transactions, such as real estate sales, wherein execution is not usually instantaneous.

⁵³ Professor Wigmore discusses the doctrine in "A Summary of Quasi-Contracts," 25 AM. L. REV. 695 at 712 (1891); Cook, "Rescission of Bargains Made on Sunday," 13 N.C. L. REV. 165 (1935).

⁵⁴ *Supra*, note 48.

⁵⁵ 6 WILLISTON, CONTRACTS, rev. ed., § 1702 (1938); *Mann v. United Motor Boston Co.*, 226 Mass. 495, 116 N.E. 239 (1917).

⁵⁶ *Palmer Bros. v. Havens*, (Tenn. 1945) 193 S.W. (2d) 91.

⁵⁷ 193 S.W. (2d) 91 at 92.

⁵⁸ *Ibid.*

referred to an earlier Tennessee case⁵⁹ which had stated the exception to the general rule applied to parties in *pari delicto*; but the cases falling within this exception concern that class of contracts which are intrinsically contrary to public policy—contracts in which the illegality itself consists in their opposition to public policy.⁶⁰ In *Knoxville v. Knoxville Water Co.*,⁶¹ another Tennessee case cited in the principal case, it was stated that the validity or invalidity of an act done on Sunday does not rest upon religious or moral grounds, or upon public policy, but solely upon the question as to whether it violates the provision of the law. Thus it would seem that a suit on a Sunday contract would not benefit by the exception to the general rule.

Thus it appears that where a Sunday contract is considered illegal, the courts apply one of three rules in determining the legal effects: (1) the vast majority hold that transfers completed by way of performance are valid and not recoverable, even though the contract itself cannot be enforced; (2) some courts deem the whole transaction void, invalidating the contract and all transfers made in pursuance thereof; (3) and other courts, although terming the contract illegal, give legal effect to the contract by excepting it from the general rules of illegality. In view of the unfairness to parties and the disruption of seemingly settled business transactions, a good corrective approach might be that suggested long ago by Professor Wigmore,⁶² involving a re-examination of the whole doctrine underlying the maxim "*in pari delicto potior est conditio defendentis.*" Or it would be possible, where so mild a type of illegality is involved, to treat Sunday bargains as completely enforceable,⁶³ preferably through specific statutory enactments as done in West Virginia.⁶⁴ In the meantime, dormant and almost forgotten statutes, restricting behavior on Sundays, may have dire effects on business transactions believed by the parties themselves to be entirely legitimate.

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⁵⁹ Darnell-Love Lbr. Co. v. Wiggs, 144 Tenn. 113, 230 S.W. 391 (1921), the wording of which seems to have been adopted in 3 POMEROY, EQUITY JURISPRUDENCE, 5th ed., § 941 (1941).

⁶⁰ POMEROY, EQUITY JURISPRUDENCE, 5th ed., § 941 (1941).

⁶¹ 107 Tenn. 647, 64 S.W. 1075 (1901).

⁶² Supra, note 53.

⁶³ Cook, "Rescission of Bargains Made on Sunday," 13 N.C. L. REV. 165 (1935).

⁶⁴ Supra, note 10.