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We are pleased to announce the election to the Editorial Board, of the following men: Ernest T. Bauer, New Haven, Conn.; Cogswell Bentley, Rochester, N. Y.; Charles M. DeForest, New Haven, Conn.; John J. Fisher, White Creek, Wis.; Hamilton M. Higday, Des Moines, Iowa; James L. Loomis, Granby, Conn.; William M. Maltbie, Granby, Conn.; Louis M. Rosenbluth, New Haven, Conn.; Charles C. Russ, Hartford, Conn.; Kinsley Twining, Clinton, N. Y.; Charles D. Francis, Winchester, Tenn., Assistant Business Manager.

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## COMMENT.

CAN THE LEGISLATURE IMPOSE UPON A STREET RAILWAY COMPANY

THE OBLIGATION TO PAVE BETWEEN ITS RAILS?

The limits of legislative control over public service corporations having special franchises in the streets have not, as yet, been definitely fixed by the decisions. A number of cases recently decided deal with this subject, the particular point being whether a street railway

company can be compelled to bear the expense of paving that part of the street specially appropriated to its use.

One of these cases is that of the *Fair Haven & Westville Railroad Company v. New Haven*, 53 Atl. 960, decided in January, 1903. In 1895 an act was passed by the Connecticut legislature authorizing the city of New Haven to issue bonds for the construction of permanent pavements. All pavements were to be laid by the city, but the city was directed to assess upon the street railway company the cost of paving a strip nine feet in width for each line of track on the street. An asphalt pavement was laid under this act, and the plaintiff company was assessed for its proportionate share. In an appeal from this assessment the constitutionality of the act was questioned by the plaintiff.

In a clear and forcible opinion the court upholds the validity of the act, and upon two grounds, the first of which is that the act is a proper exercise of the police power. The reasoning of the court is as follows: The establishment, maintenance and regulation of highways is within the police power of the State. In the exercise of this power the State, acting through its agents, may determine what repairs are necessary and upon whom the burden should reasonably fall. Such regulation must be reasonable and the burdens must be reasonably cast, but the court will not interfere with the legislative discretion except in a very clear case. In the present case there is no such apparent injustice in imposing upon the plaintiff the cost of paving that portion of the street peculiarly appropriated to its use as to justify the court in saying that constitutional powers have been transgressed.

The other ground is that the act is valid as an amendment of the plaintiff's charter. The power to alter, amend or repeal the charter was expressly reserved. While it is impossible to precisely define the limits of this power of amendment, it is clear that it extends so far as to authorize legislation imposing reasonable regulations upon a corporation operating a railway in a public street as to the condition of repair in which the street shall be kept, the improvements which shall be made therein and the share of any burden incident thereto which shall be borne by the corporation.

A similar law was upheld by the Supreme Court of Nebraska in the case of *Lincoln Street Railway Co. v. the City of Lincoln*, 84 N. W. 802, decided in 1901. This law required all street railway companies to pave or repave between and to one foot beyond their outer rails, whenever the street in which such rails were laid should be ordered paved or repaved. Counsel for the city contended that this law was valid either as an exercise of the taxing power, the police power, or the reserve power to alter or amend the plaintiff's charter. The court considers these various points and indicates its opinion that such legislation may be sustained as an exercise of either the taxing power or the police power, but it bases its conclusion upon "the broad and fundamental doctrine of the right of the legislature

to impose the burdens as a reasonable exercise of its reserve power" to amend the charter.

The Court of Errors and Appeal in New Jersey, in the case of *Fielders v. N. Jersey Street Railway Co.*, 53 Atlantic 404, decided in November, 1902, deals with the question whether a municipal ordinance imposing upon street railway companies the duty to pave, repave and keep in repair a certain portion of the street, can be properly classed as a police regulation. The validity of the ordinance depended upon the answer to this question, as the city had no charter authority to pass the ordinance except as a police regulation. The court holds that such an ordinance is not a police regulation, but an exercise of the power of taxation, and therefore unauthorized by the city charter. It will be noticed, however, that this case does not deal with the power of the State to impose an obligation to pave and repave.

The general railroad law of the State of New York, section 98, requires every street railway company having tracks in the street to "have and keep in permanent repair" that part of the street between the rails and two feet outside "under the supervision of the proper local authorities and whenever required by them to do so, and in such manner as they may prescribe."

In the case of *Conway v. Rochester*, 157 N. Y. 33, decided in 1898, it was contended that this law did not impose an obligation to repave, but the court held that an obligation to repave was imposed. The power of the legislature to impose such an obligation was not questioned by the respondent or touched upon by the court, and this case, therefore, seems to concede that the legislature has such power.

It is apparent from these decisions and others which might be cited that the courts concede to the legislative arm of the government full power to impose obligations upon street railway companies as to the pavement, repavement or repair of such parts of streets as are peculiarly appropriated to their use, and that such legislation is justified either as an exercise of the police power or the reserve power to alter, amend or repeal charters. *John Hillard.*

#### THE INCORPORATION OF TRADE UNIONS.

The recent finding of the jury against the Society under the decision of the House of Lords in the case of the *Taff Vale Ry. v. The Amalgamated Society of Railway Servants*, (1901) A. C. 426, is affording an occasion for considerable comment on the part of the public press, a comment, which it would seem, was somewhat tardy when we recall that the decision itself was rendered in July, 1901. It was then held that a trade union registered under the Trade Union Acts of 1871 and 1876, though not a corporation, might be sued in its registered name, and was collectively responsible for the acts of its members. It has been referred to as the most important

decision affecting the interests of labor since the celebrated case of *Allen v. Flood*, (1898) A. C. 1. It did not, however, enunciate any new principle of law, not at least to the courts of this country. For there would appear to be no valid reason for distinguishing between a labor union and any other voluntary association in applying the rule that a body is responsible for the authorized acts of its members.

The decision is important because its application of the principle brings into prominence the general problem of securing a greater responsibility from these organizations. For, though legally liable in this country as well as in England, they have enjoyed a practical immunity. Actions have been maintained against them, but it has been almost impossible to reach their funds so as to satisfy the judgment. For this reason it has been proposed that they be incorporated, a proposition that is ardently advocated by the friends of the union. Mr. Brandeis in an article on this subject in the January number of the *Green Bag* says: "The unions should take the position squarely that they are amenable to law, prepared to take the consequences if they transgress, and thus show that they are in full sympathy with the spirit of our people, whose political system rests upon the proposition that this is a government of law, and not of men."

The advantages to the union that would accrue from incorporation may be enumerated as follows:

1. It would do much to overcome the antagonism of the employer, because he would then have a responsible party with whom to deal.

2. It would curb the use of the writ of injunction.

3. It would restrain its members from committing those acts of violence which always alienate public sympathy and thus impede the success of strikes.

4. And it would enable the union to show that the illegal acts alleged were not committed by its members, but by strike sympathizers or general law breakers, whereas at present the adjudication is generally *ex parte*, no opportunity being given for investigation or cross examination.

#### EVIDENCE OBTAINED BY COMPULSORY PHYSICAL EXAMINATION OF PRISONER.

In absence of a specific constitutional provision that a prisoner shall not be compelled to give incriminating evidence against himself, how far may a defendant in a criminal prosecution be compelled to submit to physical examination and thereby furnish self-incriminating evidence?

It is well settled that he need not incriminate himself by verbal statements or confessions; but the boundary line beyond which the prosecuting attorney may not pass in his extracting evidence from the prisoner's clothing or person—in particular, discovery of con-

cealed marks of identification—is not well defined. Nor is it fully settled in what classes of cases the court may or may not order medical experts to examine a prisoner for the prosecution's benefit or compel him to exhibit himself to a jury.

These are questions raised in the recent case of *State v. Height*, 91 N. W. 935. The Supreme Court of Iowa (delivering its opinion through Judge Emlin McClain) seems to have experienced no little difficulty in arriving upon ground where it could "supply and enforce one of the most fundamental of all constitutional safeguards, which, for some reason, was omitted from the Iowa charter of liberties"—viz: the principle that no person "shall be compelled in any criminal case to be a witness against himself." (*Vide* Const. U. S., 5th Amendm't; Const. Iowa, Art. 1, sec. 9; 56 Cent. Law Journal, 93, note.) In this case the prisoner, charged with rape of a child, had communicated to her the venereal disease with which he was found to be infected. The trial court admitted the testimony of the physicians who had made the examination of the prisoner in the jail. On appeal the Supreme Court *held* that such admission was error.

In the absence of the specific prohibition in the constitutional bill of rights or statutes securing the citizen from such practical self-accusation, the Court, to uphold the principle, resorted to a very broad and liberal interpretation of the clause "No person shall be deprived of life, liberty or property *without due process of law*," emphasizing the necessity of maintaining the fundamental principles of legal procedure existing in this country prior to the adoption of federal and State constitutions. The court say: "The rule against requiring a witness to give self-criminating evidence in any judicial proceeding is much older than our constitution. It is one of the fundamentals of the common law. The rule itself and the reasons for it are thus stated by an eminent authority: 'Upon a principle of humanity, as well as of policy, every witness is protected from answering questions by doing which he would criminate himself,—of *policy*, because it would place the witness under the strongest temptation to commit the crime of perjury; and of *humanity*, because it would be to extort a confession of the truth by a kind of duress, every species of which the law abhors.' 1 Starkie, Ev. 41."

The Court also insist that this rule is implied under the general guaranty of due process of law. "If such guaranty is not thus to be implied \* \* \* there would be nothing unconstitutional in a statute which should restore torture by the thumbscrew or the boot as a legitimate means of securing evidence in a criminal prosecution."

The following tests and examinations have been upheld in the courts: In Iowa, ordering prisoner to stand up in the courtroom for purposes of identification (*State v. Reasby*, 69 N. W. 451); in Louisiana, compelling accused to take his feet from under a chair (*State v. Prudhomme*, 25 La. Ann. 523); in Nevada, the compulsory exhibition in court of a forearm to reveal tattoo marks (*State*

*v. Ah Chuey*, 33 Am. Rep. 530); in North Carolina, the exhibition of a hand alleged to have been burned (*State v. Garrett*, 17 Am. Rep. 1); in Pennsylvania, the propriety of requesting prisoner to repeat certain words that the sound of his voice might be heard (*Johnson v. Com.*, 9 Atl. 78); and in Texas, the requirement to make foot-prints in an ash heap (*Walker v. State*, 32 Am. Rep. 595).

On the other hand the following offered evidence has been held inadmissible: In Georgia, testimony of results of forcibly placing defendant's foot in certain tracks (*Day v. State*, 63 Ga. 667), the compulsory exhibition to a jury of the stump of an amputated leg (*Blackwell v. State*, 44 Am. Rep. 717), and testimony of forcible taking by an officer of a prisoner's shoes and comparing with tracks (*Myers v. State*, 25 S. E. 252); in Michigan, the requirement that defendant try on a shoe (*People v. Mead*, 50 Mich. 228); in New York, evidence of recent delivery of a child obtained by forcible examination by medical experts, acting under trial court's order, of a female defendant charged with murder of a bastard child (*People v. McCoy*, 45 How. Prac. 216); in Tennessee, held improper for the prosecuting attorney to place a pan of mud before jury and request the defendant to make tracks in it (*Stokes v. State*, 30 Am. Rep. 72); in Washington, held that an accused person "cannot be compelled to exhibit those portions of his body which are usually covered, for the purpose of securing identification, or in any other ways affording evidence against him" (*State v. Nordstrom*, 35 Pac. Rep. 382).

On the whole, it may be said that the courts generally stand against the invasion of personal privilege and the right of immunity from coerced exhibition or forcible inspection, notwithstanding the fact that the rigor of the old criminal law which gave reason to the rule has largely passed away. At times, it would seem, where there is a dearth of positive evidence which an examination of the prisoner's person would in all probability reveal, strict construction of this rule of privilege results in unnecessarily obstructing common justice; and in extreme cases the unjudicial mind is willing to tolerate summary punishment at the hands of the community rather than trust either the courts or the legislature.

#### UNCERTAINTY OF BENEFICIARIES IN CHARITABLE TRUSTS.

There is a great diversity of opinion in the United States as to the degree of uncertainty or indefiniteness admissible in the beneficiaries of a charitable trust. There may perhaps be said to be three different classes: (1) In those States where the statute 43 Elizabeth is recognized, great liberality in this respect is generally allowed, and trusts are seldom declared void however indefinite the beneficiaries may be, provided a power of appointment is vested somewhere, following the maxim *id certum est quod certum reddi potest*; (2) In other States the construction is much more strict; (3) while in some States no distinction in regard to the beneficiaries

is made between charitable and other trusts. It is the very uncertainty of the beneficiaries which gives jurisdiction in chancery. *State v. Griffith*, 2 Del. Ch. 392; *Chambers v. St. Louis*, 29 Mo. 589. And the better and more correct view would seem to be that though the persons to be benefited constitute a very large number and may possibly include all mankind, still the trust may be sustained if its purpose is sufficiently designated in the instrument creating it. *Jackson v. Phillips*, 14 Allen 539; *George v. Braddock*, 45 N. J. Eq. 757, 14 Am. St. 754; *Thornton v. Howe*, 31 Beav. 14; *Perry, Trusts*, sec. 705. The donor may, however, appoint trustees, and invest them with discretion to apply the fund toward a charitable purpose specified, leaving them in its application, to select from numerous persons or institutions which shall receive the bounty, or the testator may specify the charitable purpose in terms so general that the trustees must necessarily exercise a discretion in determining which of many purposes falling within the general description they shall seek to accomplish. Whether, in such a case, courts of equity in this country retain authority over the trust so as to control its administration and make it certain, and thereby declare it a valid charitable trust, is a question upon which the courts are irreconcilably divided. The majority of them perhaps maintain that courts of chancery as a part of their judicial power possess authority to so far control the administration of the trust as to compel trustees to execute it within the limits of the discretion conferred upon them, and the trust may be sustained. *Tappan v. Deblois*, 45 Me. 122; *Swasey v. Amer. Soc.*, 57 Me. 523; *Minois v. Baker*, 147 Mass. 348; *Chambers v. St. Louis*, 29 Mo. 543; *Missouri Hist. Soc. v. Acad. of Science*, 94 Mo. 459; *Murphy's Estate*, 184 Pa. St. 310; *Att'y Gen. v. Wallace*, 7 B. Mon. 611; *Moore v. Moore*, 4 Dana 354.

In this connection two interesting recent cases in Kentucky are worthy of notice. The court in *Thompson's Ex'r. v. Brown*, 70 S. W. 674, held a bequest in trust to be "distributed to the poor" void for indefiniteness of beneficiaries; and yet in *Coleman v. O'Leary's Ex'r.*, 70 S. W. 1068, the same court held that a bequest in trust "for the establishment of a home for poor men" was not uncertain and that the trustees would act under the authority of the chancellor. The former case apparently overrules the long settled doctrine in Kentucky, both as quoted by text book writers and as understood in its previous decisions. See 2 *Perry on Trusts*, sec. 748; 5 *Am. & Eng. Enc. Law*, 905-912. It is difficult to understand how the court if it follows its line of reasoning can hold the trust in *Coleman v. O'Leary*, *supra*, valid if the bequest in *Thompson v. Brown* is void. One apparently is as indefinite as the other, and if the latter is valid it certainly involves a marvellous degree of discrimination into the quantum of indefiniteness that will render a charitable trust invalid. Likewise with former decisions of the same court it is impossible to reconcile the doctrine in *Thompson v. Brown*. In *Curling v. Curling*, 8 Dana 38, Robertson, C. J., said: "As the testator has manifested an intention to dedicate his estate

to one specified class of objects embraced by the statute, if his bounty can be applied to any single object within that class, consistently with his declared purpose, and without the hazard of violating his will or making a will for him, there is no doubt that it is a trust which may be lawfully executed, and judicially upheld and enforced." And in *Moore v. Moore*, 4 Dana 354, 365, said the same judge: "When an ascertainable object is designated by the donor in general or collective terms, or when a person is appointed by him to elect a described portion or kind from a designated class, the chancellor will interpose on the ground of trust." Why, therefore, in this case of a bequest "to be distributed to the poor" is the class not sufficiently designated that the beneficiaries cannot be selected so as not to violate or to make a will for the testator? And if in *Coleman v. O'Leary*, the court determines that a home for poor men in the district of the trustee will carry out the testator's intention, why could not a similar administration be made of the bequest "to the poor?"

The court bases its decision on *Spalding v. Industrial School*, 54 S. W. 200 (Ky.), a bequest "for charitable objects," which was held invalid for uncertainty. While with more reason perhaps, it may be said that no designated class is referred to in "charitable objects," still a bequest "to the poor" is to such a designated class that it is not the same as one to "charitable objects." A gift for the benefit of the poor in general has been upheld in many cases. *Vidal v. Girard*, 2 How. 127; *Darcy v. Kelly*, 153 Mass. 433; *Bullard v. Chandler*, 149 Mass. 532; *State v. McDonough*, 8 La. Ann. 171; *Nash v. Morley*, 5 Beav. 177; *Att'y.-Gen. v. Clarke*, Amb. 422; *Clement v. Hyde*, 50 Vt. 716; *Jackson v. Phillips*, 14 Allen 539; *Doughten v. Vandever*, 5 Del. Ch. 51. And the famous statute of 43 Eliz. in enumerating "the pious and godly uses" to which it applies, employs no more definite descriptions than the following: "relief of the aged," "maintenance of sick and disabled soldiers and marines," "the marriage of poor maids," "the supportation of tradesmen and handicraftsmen," and that of "persons decayed." In many cases a high degree of indefiniteness of beneficiaries has been supported. A gift for "indigent, unmarried, Protestant females" is valid. *Tappan's App.*, 52 Conn. 412. And likewise a gift "for the greatest relief of human suffering, human want, and the good of the greatest number." *Everett v. Carr*, 59 Me. 334. And a gift to assist, relieve and benefit poor and necessitous persons will be upheld. *Suter v. Hilliard*, 132 Mass. 412; *Rotch v. Emerson*, 105 Mass. 431. Or a devise to be applied "to the dissemination of the gospel at home and abroad" is valid, as being sufficiently certain. *Att'y.-Gen. v. Wallace*, 46 Ky. (7 B. Mon.) 611; *Kinney v. Kinney*, 86 Ky. 610, 6 S. W. 593.

On the other hand, the cases where such bequests as to the poor in general have been held invalid are principally in what may be termed "strict construction" States, or States where no distinction is made between charitable and private trusts. Thus a bequest for

"foreign missions and poor saints" has been held void for uncertainty. *Bridges v. Pleasants*, 39 N. C. (4 Ired. Eq.) 26. And so a bequest of money to be distributed among "needy poor and respectable" widows is void. *Galley v. Att'y. Gen.*, 3 Leigh (Va.) 450. And in New York (until statute 1893), North Carolina, Maryland, Michigan, Virginia, and Wisconsin it has been declared that the statute 43 Eliz. did not extend to this country.

But inasmuch as Kentucky has always allowed a very high degree of indefiniteness in beneficiaries of charitable bequests, and the Statute 43 Eliz. is almost bodily incorporated into the statutes, and the court professes to follow and not overrule the former decisions it would seem that it was incorrectly held that a bequest "to the poor" is invalid.