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LEGAL IMMUNITY GIVEN TO WITNESSES NEED PROTECT THEM ONLY IN THE JURISDICTION WHERE TESTIMONY IS GIVEN.

The late case of *Jack v. State of Kansas,* 26 Sup. Ct. 73, decides that it is not a deprivation of liberty without due process of law to compel a witness to testify under the Kansas anti-trust act, where the statute is construed by the state courts to render material only such questions as relate to transactions within the state, and grants full immunity from prosecution in the state courts; although there is danger that the testimony given in the examination might incriminate the witness as a violator of the Federal anti-trust act. The principal ground for so deciding is the fact that it is highly improbable and it cannot be presumed that under such circumstances any Federal prosecution would ever take place. Justices Brewer and McKenna dissented.

It is an ancient principle of the law of evidence, that a witness shall not be compelled in any proceeding to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures. *Rex v. Slaney,* 5 Carr and P. 213. It will be observed that the common-law rule extends a broader privilege to the witness than the words of the Constitution. By the common law a witness in any case, in any court, was entitled to refuse to answer where the answer would have a

tendency to criminate him. The common-law rule was embodied in 14 and 15 Vict. c. 99, sec. 3. It is therefore apparent that the clause in the Constitution limits and qualifies the common-law rule. Under the Constitution, it is only "in a criminal case" that a witness can refuse to answer. Chief Justice Marshall in *Burr's Trial,* 1 Burr's Trial, 244, gave his views in this matter as follows: "What testimony may be possessed, or is attainable, against any individual the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essntial part of a crime which is punishable by the laws."

The extent to which the witness is compelled to answer such questions as do not fix upon him a criminal culpability is within the control of the legislature. *State v. Nowell,* 58 N. H. 314. It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled when acting as a witness in any investigation, to give testimony that he had himself committed a crime. The privilege is limited to criminal matters; but it is as broad as the mischief against which it seeks to guard. *Counselman v. Hitchcock,* 142 U. S. 547.

The case under discussion is within the reasoning of the case of *Brown v. Walker,* 161 U. S. 591. In that case it was contended on the part of the witness that the statute did not grant him full immunity against prosecutions in the state courts, although it granted him full immunity from prosecutions by the Federal government. This contention was held to be without merit, on the ground that the danger of such a prosecution was too unsubstantial and remote. Four of the judges dissented. Justice Shiras in a forcible dissenting opinion said: "It is urged that, even if the state courts would not be compelled to respect the saving clause of the Federal statute, in respect to crimes against the state, yet that such a jeopardy is too remote to be considered. The force of this contention is not perceived. On the contrary, such is the nature of the commerce which is controlled by the Interstate Commerce law, so intimately involved are the movements of trade and transportation, as well within as between the states, that just such questions as those which are now considered may be naturally expected to frequently arise. It is certainly speaking within bounds to say that the effect of the provision in question, as a protection to the witness, is purely conjectural. No courts can

foresee all the results and consequences that may follow from enforcing this law in any given case. It is quite certain that the witness is compelled to testify against himself. Can any court be certain that a sure and sufficient substitute for the constitutional immunity has been supplied by this act; and if there be room for reasonable doubt, is not the conclusion obvious and a necessary one?" The presence of dissenting opinions in nearly all these cases, in the face of the doctrine of *stare decisis,* seems to indicate that plain logic is not wholly on the prevailing side of the question.

CONSTITUTIONALITY OF MUNICIPAL REGULATION OF MILK BUSINESS.

The sanitary code of the city of New York confers discretionary power upon an administrative board to grant or withhold permission to sell milk within the city. It is held in *People ex rel. Lieberman v. Van de Car,* 26 Sup. Ct. 144, that this is a proper subject for regulation within the police power of the state and, in the absence of any showing of arbitrary or oppressive exercise of such power, it will not be considered violative of the right to due process of law guaranteed by the Fourteenth Amendment of the Federal Constitution. It is further held that it is not denying the equal protection of the laws guaranteed by the Constitution to single out the milk business so long as all dealers in the city are equally affected by such regulation. Equal protection of the laws is secured so long as the principle of equality is preserved among all those engaged in the business. *Powell v. Pennsylvania,* 127 U. S. 678; *Mo. Pac. Ry. Co. v. Humes,* 115 U. S. 512.

Dealing in milk in a large city is manifestly such an occupation as necessitates most careful regulation. Wholesome milk should be insured to the people who are practically helpless to protect themselves. It is proper for the legislature to delegate this power to a muncipal board, investing them with power to pass ordinances not only restricting and conditioning its supply and the manner of transporting and keeping it but also licensing its sale. *City of Newton v. Joyce,* 166 Mass. 83; *Gundling v. Chicago,* 177 U. S. 183; *New Orleans v. Faber,* 105 La. 208.

A sort of absolute control over persons and property in order that the health of the community may be secured is one of the fundamental necessities of government and has from very early times been vested in a board or in officers, who are not bound to wait for the slow course of justice but have power to take summary jurisdiction. In such matters a due process of law is simply a correct and orderly proceeding observing all the securities for pri-

vate right applicable to the particular case. A jury is inappropriate and has never been used in this class of cases. "Different principles are applicable in different cases and require different forms and proceedings; in some they must be judicial, in others the government may interfere directly, and *ex parte*." *Story on Const.* (4th ed.) sec. 1943; *Cooley's Const. Law,* 241. The right to a particular remedy is not a vested right. *Walker v. Sauvinet,* 92 U. S. 90; *Ex parte Wall,* 107 U. S. 265.

In the light of recent history it may appear that the people may be called upon to suffer many outrages at the hands of the average municipal board in which such arbitrary power is vested, but on the other hand we must consider the absolute necessities of the case and let our hopes follow the presumption that a public officer will do his duty. It is on this ground that this and like ordinances are attacked. Officers may act arbitrarily and in disregard to their duty, licensing one person and refusing another similarly situated, giving great chance for monopoly and blackmail and thereby denying equal protection of the laws and due process of law. But public officials are presumed to do their duty and where the grievance is not in fact, the law is to be judged not by what may be done thereunder in disregard of duty but what may be lawfully done thereunder. *Jacobson v. Massachusetts,* 197 U. S. 11.

In this case compulsory vaccination was required by an ordinance framed in such broad terms that it might compel a person to submit when his physical condition would make the operation dangerous to life. It was held that while in this supposed case the authority might not be sustained, yet the complainant, being of sound body, offered no case for constitutional protection. There may be a public monopoly granted by law if for public reasons and if the public is served impartially. *Slaughter House Cases,* 16 Wall. 36. Where ordinances giving power to license one and refuse another similarly situated have been brought before the court on an actual grievance they have been held unconstitutional. *Chicago v. Netcher,* 183 Ill. 108; *Noel v. People,* 187 Ill. 587.

It is often argued that milk vending is one of the ordinary vocations of life, which anyone has a right to enter, and though he may be punished for not conforming to reasonable rules regulating the business he cannot be restrained from engaging in it altogether. But the police power may be lawfully resorted to for the preservation of health, even when it involves the summary destruction of property or deprivation of individual rights, and what is necessary is largely in the discretion of the legislature. *Lawton v. Steele,* 152 U. S. 133; *Dunn v. Burleigh,* 62 Me. 24.

Whether the determinations of the board are judicial and reviewable by mandamus or certiorari proceedings, or whether relief can be had solely through the removal of the board, are questions suggested in the case but not answered.

"FORMER JEOPARDY" AS APPLIED IN THE PHILIPPINES.

The Supreme Court of the United States has again shown the facility with which it can dodge a former decision in order to attain justice; for the decision in *Trono et al. v. U. S.*, 26 Sup. Ct. 121, is not entirely in harmony with those in *Mendezona v. U. S.*, 195 U. S. 185, and *Kepner v. U. S.** 195 U. S. 100. In the last mentioned case the plaintiff in error had been acquitted of the crime charged against him in the court of first instance, the government appealed and the higher court reversed the judgment of acquittal and found Kepner guilty of the crime of which the court of first instance had acquitted him. Upon a writ of error the Supreme Court of the United States held that the accused had been twice in jeopardy for the same offense and therefore reversed the decree of the supreme court of the islands and discharged Kepner. It was also there held that the government had no power to obtain a review of a judgment or decision acquitting an accused party, and if the court had based its decision squarely upon this point it would not have laid itself open to the remark made at the beginning of this comment, a remark which I do not make upon my own responsibility, but which I take from the opinion of a majority of the Supreme Court itself; for four of its number, including the Chief Justice, dissented from the Trono decision, and a fifth, Mr. Justice Holmes, concurred in the result only, presumably, upon the same grounds that he dissented from the Kepner decision, thus clearly showing that he thinks the two decisions inconsistent. Hence five of the Supreme Court Bench are of the opinion that the decision in the Trono case is inconsistent with the decision in the Kepner case. In the Trono case, a man indicted for murder was convicted of assault in the lower court and himself appealed to the supreme court of the islands. They reversed the decision of the court below and convicted him of murder in the second degree. The Supreme Court of the United States sustains that decision, saying: "The difference is vital between an attempt by the government to review the verdict or decision of acquittal in a court of first instance and the action of the accused person in himself

* For comment, see YALE LAW JOURNAL, Vol. XIV. page 43.

appealing from the judgment and asking for its reversal, even though that judgment, while convicting him of a lower offense, acquits him of the higher one, charged in the complaint. We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it, and to ask for a reversal, he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense contained in that judgment which he has himself procured to be reversed."

It seems almost certain that justice was maintained in this particular case, for if a man was guilty of an assault which caused a death, it is difficult to conceive how he is not guilty of murder. But this decision was reached by introducing into the law of the Phillipines the doctrine of implied waiver of the right to plead a former acquittal, which appears to be a rather arbitrary fiction of law, as it imputes to an accused an intention which anybody's common sense must tell him that the accused, as a matter of fact, does not have. This point impressed Justice Holmes, and in his dissenting opinion in the Kepner case, he not only brings *it* out very clearly, but in so doing he assumes a hypothetical case very similar to the Trono case and predicts that the decision must be as it later turned out: "If a statute should give the right to take exceptions to the government, I believe it would be impossible to maintain that the prisoner would be protected by the Constitution from being tried again. He no more would be put in jeopardy a second time when retried, because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. It cannot matter that the prisoner procures the second trial. In a capital case a man cannot waive and certainly will not be taken to waive, without meaning it, his fundamental constitutional rights. Usually no such waiver is expressed or thought of. Moreover it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."*

In the same opinion he lays down as the original rule, a proposition which if it had been adhered to, would have logically main-

* 195 U. S., 135.

tained justice and at the same time avoided the confusion caused by the ramifications from that rule: "The jeopardy is one continuing jeopardy from its beginning to the end of the case. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case, where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case."

But it is now too late to theorize upon how logical the law for the Philippines might have been on this subject, for it is settled; if we consider the present decisions in their strongest aspect, that the government has no power to obtain a review of a judgment or decision of the trial court acquitting an accused party, and that if the accused obtains a review of a judgment or decision of the trial court, he thereby waives all rights to plead *autrefois acquit* as well as *autrefois convict* in the trial *de novo.*

THE RIGHT OF A RAILROAD COMPANY TO GRANT TO A CAB COMPANY THE EXCLUSIVE USE OF ITS CAB STAND.

The Supreme Court of the United States, in the recent case of *Donovan v. Pennsylvania Co.,* 26 Sup. Ct. Rep. 91, held that a railroad company may make arrangements with a cab company to provide cabs for its passengers and may exclude all other cabmen from its station or depot. This is a question upon which there has been considerable conflict in the various state courts. At common law a railroad company is under no obligation as a common carrier to afford accommodations to hackmen for a transaction of their business of carrying passengers to and from the depots of the company. If, then, it is not obliged to furnish accommodations to any, why may it not discriminate?

The cases holding the contrary go upon the theory that when the company uses its ground as a stand for hacks, it must use it for the benefit of all and not for the benefit of one in exclusion to others. They acknowledge that it could probably refuse to allow any hacks to use its grounds, but argue that when it gives the right to one it must give the right to all and give equal facilities to all. If one was disorderly, he probably could be lawfully ejected. A railroad company can make all reasonable rules and regulations in regard to its premises and can exclude all persons having no business with the company or its passengers; but these cases hold that it cannot arbitrarily admit one hackman and exclude others for no other reason than its own profit. Such rules must affect everyone alike. The granting of such an exclusive privilege is a

discrimination tending to destroy competition and to encourage a monopoly which is of course contrary to public policy. *Markham v. Brown,* 8 N. H. 523. The contract of the railroad company does not require that it furnish conveyance either to bring the passenger to the station or to take him away. The passenger may employ whatever cabman he pleases to take him to or from the depot, and any interference with this right is unlawful. *Railroad Co. v. Langlois,* 9 Mont. 419. This is the theory of the dissenting cases. See *Cravens v. Rodgers,* 101 Mo. 247.

One of the strongest cases in support of the railroad company's right to make such a contract is *R. R. Co. v. Tripp,* 147 Mass. 35. The court holds that a railroad is bound to furnish reasonable facilities for all persons using its road for transportation from the depot to their destination. If the company sees fit to give the exclusive right to the use of its depot for the purpose of soliciting passengers to one hackman, it may do so, provided he furnishes reasonable services. This does not stop other hackmen, who have business with the company, from using the depot. They may bring passengers or baggage to the depot or may take the same away when they have a contract with the passenger to do so. But they cannot use the depot for the purpose of soliciting business. The hackman is a stranger to both the company and the passenger and can claim no right to use the station and if he does use it, he is liable as a trespasser. *R. R. Co. v. Tripp, supra.*

It would be unfortunate if railroad companies, as against hackmen, should have no control over their premises. Such a rule is to be regretted as it would give all the hackmen in a large city the right to make the premises of the railroad company a hack stand for the purpose of soliciting passengers. It would prevent the company from properly protecting its passengers when leaving its depot. *N. Y. Cent. R. R. Co. v. Flyn,* 26 N. Y. Supp. 859.

A railroad company may carry on, in connection with its business as carrier, any other business or may use its property in any way not inconsistent with its duties as a carrier. Its property is its own and except to the extent to which it has been devoted to public use, the company may use it for its own profit to the exclusion of others. A railroad company may engage in carrying passengers in hacks and if it does engage in such business it has the right to use its own property for such purposes. If it has such right it can as well employ another to do such service as to buy hacks and run them itself. If the company has the right to its platform it has the right to sell such right to another for a valuable consideration, especially if such

consideration conduces to the benefit of the public. Anyone on the premises of the company and not there for the purpose of coming or going on a train, though perhaps not a trespasser, may, after request, be ejected. *Johnson v. R. R. C.*, 51 Iowa, 25; *Barney v. Steamboat Co.*, 67 N. Y. 301. By giving fair notice, a railroad company may treat as intruders all who come to transact business with persons other than the company itself. Bleckley, C. J., says: "It is manifest that the grant of the privilege to one or more is no rightful cause of complaint on the part of others to whom a like privilege is denied." *Fluker v. R. R. Co.*, 81 Ga. 461.

The railroad company owning its property and having the possession of it, has the same control of it that a private person would have under like circumstances provided it discharges its duty to the public with reference thereto as a common carrier.

Nor does a hackman come within the operation of statutes regulating common carriers. He has no established route or schedule. He lets his carriages for any length of time and often to a less number than it will hold. He works or remains idle as he pleases. For these reasons he does not come within the meaning of such statutes. The weight of authority is in favor of the right of the railroad company to grant such an exclusive privilege to a hackman, in accordance with the doctrine laid down in the principal case.