

Even if proved, it would not aid this case. *Maxwell v. Palmerton*, 21 Wend. 408. In the case cited, Chief Justice NELSON says: "If a dog be in fact ferocious at large, and a terror to the neighborhood, the public would be justified in dispatching him at once." The same statement had previously been made in *Putnam v. Payne*, 18 Johns. 312, and is no doubt the law. No person has a right to keep a dog that persistently assails travelers passing peaceably along the public road, and the fact that many persons permit their dogs to do so does not justify the practice. In any view of the case, therefore, the judgment cannot be sustained. The judgment is reversed, and the cause remanded to the district court for further proceedings. The other judges concur.

STATE v. O'ROURK et al.

(Supreme Court of Nebraska. Nov. 10, 1892.)

SUNDAY LAW — "SPORTING" — PLAYING BASEBALL.

1. Under the provisions of section 241 of the Criminal Code, any person of 14 years of age or upwards who shall on Sunday engage in sporting, etc., shall be fined in a sum not exceeding \$20, or be confined in the county jail not exceeding 20 days, or both.

2. Playing baseball on Sunday comes within the definition of "sporting," and renders the persons engaging therein liable to the punishment provided for in section 241.

(Syllabus by the Court.)

Error to district court, Lancaster county; HALL, Judge.

Tim O'Rourke and others were arrested on a complaint and information charging them with a violation of the Sunday law by playing baseball. The case was submitted to the county judge on a stipulation of facts, and he discharged the defendants. On error to the district court, the judgment of the county court was affirmed. Leave was obtained to file a petition in error in the supreme court to settle the law of the case. Judgment that the district and county court erred in holding that defendants were not liable, and in dismissing the action.

N. Z. Snell, Co. Atty., *Frank W. Lewis*, and *J. R. Webster*, for the State. *Chas. E. Magoon*, for defendants in error.

MAXWELL, C. J. In April, 1891, the county attorney of Lancaster county filed in the county court of that county a complaint as follows: "The complaint and information of James G. Guild, of said county, made before me, Willard E. Stewart, county judge of said county, on this 30th day of April, A. D. 1891, who being duly sworn on his oath says that Tim O'Rourke, Chas. S. Abbey, Clarence Baldwin, John O'Brien, Clarence Conley, Wm. Goodenough, Fredk. Ely, Chas. Hamburg, Jewett Meekin, Chas. Collins, John Cline, Henry Raymond, John Rowe, Jesse Burkett, John Irwin, Owen J. Patten, Philip Tomney, Park Wilson, Emmett Rogers, William Darnbrough, each of said persons being of the age of fourteen years and upwards, on the 26th day of April, A. D. 1891, said day being the first day of the week, commonly called 'Sunday,' at said county

of Lancaster, did unlawfully engage in sporting, and were found sporting and engaged in the game commonly called 'baseball,' at Lincoln Park baseball grounds, an inclosure where the game or athletic sport commonly known as 'baseball' is played and performed as an exhibition by professional players to spectators, who are admitted to such exhibition for a fee, and rewards by such spectators paid to view the same, there being then present about thirty-five hundred spectators at the time aforesaid and place aforesaid, viewingsaid athletic sport; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska. Affiant further says the said Tim O'Rourke, Chas. S. Abbey, Clarence Baldwin, John O'Brien, Clarence Conley, Wm. Goodenough, Fredk. Ely, Chas. Hamburg, Jewett Meekin, Chas. Collins, John Cline, Henry Raymond, John Rowe, Jesse Burkett, John Irwin, Owen J. Patten, Philip Tomney, Park Wilson, Emmett Rogers, William Darnbrough, each of said persons being of the age of fourteen years and upwards, on the 26th day of April, A. D. 1891, said day being the first day of the week, commonly called 'Sunday,' at the county of Lancaster, at Lincoln Park baseball grounds, an inclosure where the game or athletic sport commonly known as 'baseball' is played and performed by professional players, employed and hired for and during a fixed period of six months then current, at a fixed and agreed reward and monthly salary, to pursue the vocation of playing said game of baseball for the entertainment of spectators for hire, did unlawfully engage in common labor, to wit, performing the game or athletic sport commonly known as 'baseball,' for hire, the same being their regular employment and vocation, in which said employment and vocation they were then and there found, such common labor not being a work of necessity or charity; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska." The parties were thereupon arrested, and taken before the county judge for trial.

The attorneys for the parties entered into an agreement as to the facts, as follows: "It is hereby stipulated and agreed that this case shall be submitted to the above-named county judge for trial and determination upon the following agreed state of facts, viz.: "First. On Sunday, the 26th day of April, 1891, between the hours of 3 o'clock and 5 o'clock P. M., in the county of Lancaster and state of Nebraska, the defendants played a game of baseball. (2) On said 26th day of April, 1891, each of said defendants was over the age of fourteen years. (3) The playing of said game of baseball was not a work of charity or necessity. (4) Three thousand spectators were present at the time said game of baseball was played, and paid an admittance fee for the privilege of viewing said game while it was being played, but no part of said admittance fee was paid to or received by the defendants or any of them. (5) On the day said game of baseball was played the defendants were each

under employment by the month to play baseball for compensation, but playing baseball was not the usual or ordinary vocation of the defendants or any of them.

(6) Said game of baseball was played upon the grounds of private parties, and was not played within one-half mile of any dwelling house, schoolhouse, church building, or the limits of any incorporated city or village. Said game was not played within one hundred yards of any public highway, and the grounds upon which said game was played were inclosed by a tight board fence ten feet high, which fence completely obstructed the view from the outside of said inclosure. Said game was not played for any stake, wager, or thing of value. (7) Upon the foregoing agreed state of facts, and without further testimony or evidence, this case shall be submitted to said county judge for trial and determination."

The case was then submitted to the county judge upon the complaint and stipulation of facts. He held that the "complaint and stipulation of facts do not charge or establish facts constituting an offense under the laws of the state of Nebraska," and therefore discharged the persons accused. The case was taken on error to the district court to settle the law relating to the matter. The district court affirmed the judgment of the county court. Whereupon the county attorney asked and obtained leave of this court to file a petition in error to settle the law of the case. Section 241 of the Criminal Code provides: "If any person, of the age of fourteen years or upwards, shall be found on the first day of the week, commonly called 'Sunday,' sporting, rioting, quarreling, hunting, fishing, or shooting, he or she shall be fined in a sum not exceeding twenty dollars, or be confined in the county jail for a term not exceeding twenty days, or both, at the discretion of the court. And if any person, of the age of fourteen years or upwards, shall be found on the first day of the week, commonly called 'Sunday,' at common labor, (work of necessity and charity only excepted,) he or she shall be fined in any sum not exceeding five dollars nor less than one dollar: provided, nothing herein contained in relation to common labor on said first day of the week, commonly called 'Sunday,' shall be construed to extend to those who conscientiously do observe the seventh day of the week as the Sabbath, nor to prevent families emigrating from traveling, watermen from landing their passengers, superintendents or keepers of toll bridges or toll gates from attending and superintending the same, or ferrymen from conveying travelers over the water, or persons moving their families on such days, or to prevent railway companies from running necessary trains."

Webster defines "sport:" "To play; to frolic; to wanton." (2) "To represent by any kind of play,"—and, as synonyms, gives "to play; frolic; game; wanton." Ed. 1881, p. 1276. The definitions in the Century are the same, but somewhat more extended. In the same authority, (Webster,) p. 111, "baseball" is defined as "a game of ball, so called from

the bases or bounds, usually four in number, which designate the circuit which each player must make after striking the ball." That playing baseball comes within the term "sporting," and is therefore a violation of the statute, there can be no doubt.

But it is claimed, in effect, that restraint of the kind named is in contravention of natural right or religion, and therefore is in excess of the powers of the legislature. The right of free, equal, and undisturbed enjoyment of religious opinion, whatever it may be, and to fully discuss the same, is secured to every one. Free discussion, however, is the outgrowth of free government. All free government is based on the divine law. God gave the 10 commandments to Moses, which contain rules designed to apply to the whole race. Although given to the Israelites, they were designed for all humanity. The Israelites were constantly lapsing into idolatry. There are noble examples of manhood, however, in their history, but the ignorance of the public, the almost continuous wars internecine, offensive or defensive, together with the pagan influences of the surrounding nations, prevented the development of the nation, and it became a prey to the Babylonians, and later the Roman empire. If we look at the world at the time of the birth of Christ, there was not, so far as we know, a nation where equal and just rights were enjoyed by all; nor where the rights of the poor were adequately protected and enforced, if, indeed, considered. The Roman empire, then at the height of its power, had much to commend it. Many of its rulers were men of genius, ability, and manhood, but punishments of all kinds were of the most cruel character. War was carried on for conquest, and with a degree of barbarity that shocks our feelings of humanity. Captives were sold into slavery, and practically possessed no rights that their masters were bound to respect. A pastime of the Roman populace was to witness deadly contests of captives with wild beasts or each other. Even as late as the third century after Christ's birth, this barbarous practice was in force. Gibbon, in the Decline and Fall of the Roman Empire, (Millman's Ed., vol. 1, p. 386,) says: "We cannot, on this occasion, forget the desperate courage of about four score gladiators, reserved, with near six hundred others, for the inhuman sports of the amphitheatre. Disdaining to shed their blood for the amusement of the populace, they killed their keepers, broke from the place of their confinement, and filled the streets of Rome with blood and confusion. After an obstinate resistance, they were overpowered and cut in pieces by the regular forces; but they obtained, at least, an honorable death, and the satisfaction of a just revenge." Cruelty was the rule, and death inflicted as punishment for trivial causes. Specimens of Roman justice may be seen in the trial of Christ before Pilate, and Paul before Felix and Festus. In neither case was there the semblance of an accusation based upon law, yet Christ was condemned to please a mob, and Paul would have been delivered to men who had sworn to kill him but for

his appeal to Cæsar, and even then he was held a prisoner for two years without a charge against him. The indigent, unfortunate, and discouraged were permitted by the law to sell themselves as slaves, and the rights of the poor were to a great extent at the mercy of the rich and powerful. While there were amphitheatres for the exhibition of brutal contests between men and wild beasts, or between captives, to furnish amusement to an unfeeling populace, there were no public hospitals for the insane, sick, or unfortunate. In addition to this, covetousness, licentiousness, and other vices prevailed to an extent unknown at the present time; nor, so far as we are informed, was any nation superior in any of these respects to the Romans. The most favorable view that can be taken of any government of that date is to say that might was the potent force, and right a remote consideration. The birth of Christ was announced by the proclamation by angels of peace and good will to men, which should be to all people. His birth was among the poor and lowly, as if to show that wealth is a mere circumstance, which adds nothing to either the usefulness or respectability of its possessor. He taught purity of life, unselfishness, good will towards friends and foes alike, doing good to all as opportunity offered; that religion affected and controlled the life of the individual, and did not consist in mere outward observances. He condemned covetousness, licentiousness, selfishness, and self-righteousness, and insisted on the equality of the race. He practiced His own preaching, and led a life of poverty, purity, and doing good. None so poor as not to claim His sympathy and assistance, nor so wealthy and great as to be above His consideration. The lepers, the blind Bartimeas, the rich centurion, alike were recipients of His beneficence. All were welcome, the only conditions being that they needed His aid and applied for it. His unselfishness, His magnanimity, the nobility of His character, were misunderstood by those who were looking for a deliverer from the Roman yoke, and by others who had been taught to regard the law of Moses as perfection. The Jews, who, as the children of Abraham, deemed themselves the favored people of God, were neither expecting nor desiring a leader for mankind, but rather one who, like Moses, would lead them out of hated Roman bondage. Neither could they understand a system that, while accepting much of the law of Moses, proposed to supersede its rites and ceremonies. Many centuries before the prophets in glowing language had foretold the birth of a son, the Prince of Peace, who would establish His throne with judgment and justice forever. These statements seem to have been taken literally, as applying alone to an earthly prince, who should destroy the enemies of the Jews. It is apparent, however, that the prophets' utterances refer to a spiritual ruler, who would conquer by love, and whose followers would be guided by his precepts and establish justice and right.

From the crucifixion of Christ until the present time the contest between Chris-

tianity and wrong has been going on. Wherever Christianity has prevailed, free and untrammelled, liberty has existed. It forbids cruelty, haughtiness, arrogance, pride, licentiousness, and covetousness. It requires a return of good for evil, and aid for the suffering in distress, whether friend or foe, and has established the rule that we shall do unto others as we would have them do unto us. It requires honesty, honor, and integrity in all the affairs of life, and fair treatment of every one. In every Christian land it has swept away the harem and seraglio, made bigamy and polygamy crimes, and elevated woman from a condition of semi-slavery to be the equal of man. It has broken the captive's chains, and mitigated the horrors of war, and there are indications that between Christian nations, at least, soon "they shall beat their swords into plowshares, and their spears into pruning hooks." It has abolished slavery in every Christian land, and enfranchised the slave, and given him an opportunity to develop his manhood. It has ennobled labor, and established the rule that "the laborer is worthy of his hire." We admire the declaration of independence as a statement of principles based upon the equality of the race, and give credit to the authors as statesmen and benefactors, not only of this nation, but mankind. The sturdy independence of the barons who, at Runnymede, compelled King John to sign *Magna Charta*, has been the subject of eulogy in both song and story, but the principles of both are found in the sermon on the mount. It may safely be said that the charter of liberty reaches back to Christ's teaching. Christianity is woven into the web and wool of free government, and, but for it, free government would not have existed, because no other system has been able to check the selfishness, greed, arrogance, cruelty, and covetousness of the race.

In *People v. Ruggles*, 8 Wend. 228, in a prosecution for blasphemy, Chief Justice Kent said: "There is nothing in our manners or institutions which has prevented the application of the necessity of this part of the common law. We stand equally in need, now as formerly, of all that moral discipline, and of those principles of virtue, which help to bind society together. The people of this state, in common with the people of this country, profess the general doctrines of Christianity as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. It would go to confound all distinction between things sacred and profane; for, to use the words of one of the greatest oracles of human wisdom, 'profane scoffing doth, by little and little, deface the reverence for religion,' and who adds in another place, 'two principal causes have I ever known of atheism,

—curious controversies and profane scoffing.' 2 Lord Bacon's Works, 291, 503. These things which corrupt moral sentiment, as obscene actions, prints, and writings, and even gross instances of seduction, have, upon the same principle, been held indictable; and shall we form an exception in these particulars to the rest of the civilized world?"

It may be true that the professed followers of Christ are not as unselfish in all cases as they should be, or as is their right and privilege, but progress is being made in that direction, and many examples of self-denial and unselfishness may now be found. Let a cry of distress and a call for help come from any part of the world by reason of some great calamity, and the Christian nations at once respond by liberal contributions and other means to relieve the distress. Schools and colleges are liberally provided and patronized, and education is general. Hospitals and asylums exist on every hand for the poor, the insane, the blind, deaf, and unfortunate, while punishments for offenses are graduated in proportion to the offense, and a conviction can only take place after a fair public trial, upon specific charges, and death is imposed in no case except murder or treason. No fair-minded student of history will deny that these benefits and liberty itself flow from Christianity. It appeals alone to reason, and asks for adoption because of its excellence. It makes no person the keeper of another's conscience, but requires every one to judge and act for himself. It tolerates the utmost freedom of opinion and worship, and seeks to coerce no one except by the force of reason. But, while allowing the force of reason to be the sole guide in the adoption or rejection of Christianity, its followers have been impelled from duty to combat wrong and oppression on every hand. These were strongly entrenched in the selfishness, covetousness, and other vices of the race, so that they have yielded slowly: but they have been gradually dispelled like clouds after a storm, so that the sun shines almost clearly and without obstruction. This result has been brought about by almost constant effort, and has cost the lives of hundreds of thousands of martyrs and patriots, and it can only be preserved by constant vigilance. As a Christian people, therefore, jealous of their liberty, and desiring to preserve the same, the state has enacted certain statutes, which, among other things, in effect recognize the fourth commandment and the Christian religion, and the binding force of the teachings of the Saviour. Among these is the statute which prohibits sporting, hunting, etc., on Sunday.

The human body, considered as a machine, is the most perfect mechanism of which we have any knowledge. If properly cared for and treated, it will, in ordinary cases, where there are no hereditary defects, retain its vitality and vigor to old age, but every movement of the body or action of the brain involves waste of the vital force, and this the Creator has provided shall, to a great extent, be replenished during sleep. Hence it is necessary to spend about one third of our time in

sleep. While it is true that the reserve force of life is so great in many persons as to enable them to live for a time with less than the normal amount of sleep required, yet, if continued for any considerable time, the general health will be affected; and to entirely abstain from sleep for a week or more, as in cases of certain fevers, like the typhoid, almost unavoidably results in temporary insanity, if not death. But the recuperation from sleep in most cases does not restore full tone to the system, and Sunday is like an oasis in the journey of life, where each traveler may be refreshed and become more able to continue the performance of his duties or labors. As a natural consequence, if the vitality of the body is permitted steadily to decrease without being replenished, life will be proportionately shortened. Therefore if a person labors continuously at hard and exacting labor, without rest, for many years, his health is liable to be impaired, and he become prematurely old. No doubt one of the objects of the Creator in establishing the Sabbath as a day of rest was to provide for restoring and retaining, as far as possible, health and strength and perfect action of the body. Every person of observation knows that the man who labors seven days in the week continuously for any considerable length of time lacks the spring and elasticity of action of another of like years, and naturally active habits, who rests on Sunday. Experience has also shown that men will accomplish more labor in a series of years by working six days in the week than by continuous application. Sunday is to be a day of rest. Worldly cares are to be laid aside, and the worries of business or pleasure thrown off. How gladly the tired laborer, workingman, farmer, merchant, manufacturer, attorney, and judge welcome Sunday as a day of rest, and on the succeeding Monday enter upon their respective labors with renewed strength and vigor. The idler and trifler may complain of the loss of time from resting on Sunday, but the active, intelligent worker knows that thereby he has increased his capital stock of health and chances of longevity.

Christ sought to apply the Sabbath to its appropriate use. The Jewish religion at that time consisted largely of outward ceremonies, which were performed with a rigor never intended by the author of the Mosaic law. It is evident that great reliance was placed upon these outward ceremonies. Christ, however, while not condemning many of these ceremonies, intended to show that the mere observance of these was not sufficient; that the Sabbath was made for man, and not man for the Sabbath; and in effect, therefore, that works of charity, mercy, and necessity not only could, but of necessity should, be performed on that day. He recognized the Sabbath, however, as a day of rest set apart by the Creator. After His death and resurrection, His disciples, to commemorate that event, changed the day to the first day of the week, and that day is now observed by the great body of His followers throughout the world, and is recognized by both the com-

mon and statute law. In this state the right of every one to worship God according to the dictates of his own judgment and conscience is recognized, and hence it permits those who prefer to keep the seventh in place of the first day of the week to do so. The law, both human and divine, being thus in favor of abstaining from sporting, etc., on Sunday, is a reasonable requirement, and should be enforced. The deliberate violation of such a law there is reason to believe in many cases is but the commencement of a series of offenses that lead to infamy and ruin; and, in any event, the influence upon the participants themselves has a tendency to break down the moral sense, and make them less worthy citizens. The state has an interest in their welfare, and may prevent their violation of the law. The state, in order to prevent vice and immorality, may punish licentiousness, gambling of all kinds, the keeping of lotteries, enticing minors to gamble, or to permit one under 18 years of age to remain in a billiard room; to punish publishing, keeping, selling, or giving away any obscene, indecent, or lascivious paper, book, or picture; and also punish any person who shall lend or show to any minor child any such paper, publication, or picture, etc. The law also punishes the disturber of a religious meeting, school meeting, election, etc. These cases show the importance felt by the legislature of evils of the kind named and others, by means of which, in addition to wrongs inflicted on the persons injured, a spirit of insubordination is created and fostered which incites to evil, and tends to subvert the just and equal rights of some or all. In addition to this, every person has a right to the quiet and peace of a day of rest. He has also a right to the enforcement of the law, so that the evil example of a defiance of the law shall not be set before his children. The state has an interest in their welfare, also, in order that they may become useful citizens and worthy and honorable members of society. The fact that the defendants were some distance away from the residence of any person can make no difference. It did not change the nature of the offense nor excuse the act. It was a violation of the law, just the same. The question here presented was before the Kansas City court of appeals in *State v. Williams*, 35 Mo. App. 541, and it was held the parties were liable. Afterwards the question of the validity of a contract arose. In *Association v. Delano*, 37 Mo. App. 284, in an action upon a contract, it was held that, under the Missouri statute, athletic games and sports on Sunday were not prohibited. The case was then taken to the supreme court of that state where the judgment was affirmed. *Association v. Delano*, 18 S. W. Rep. 1101. An examination of the statute shows that it is not as broad as ours. In addition to this, it is evident the question of the validity of the contract was not raised by the pleadings, and therefore was not in issue. Under our statute, however, sporting is clearly prohibited, and the party guilty thereof is liable to the punishment provided by statute. It is unneces-

sary to consider the other branch of the case. The district court, and also the county court, erred in holding the defendants were not liable, and dismissing the action. The other judges concur.

KOEN v. STATE.

(Supreme Court of Nebraska. Nov. 16, 1892.)

CRIMINAL LIBEL—WHEN FELONY—NEWSPAPERS—NECESSITY OF GENERAL CIRCULATION.

1. In a prosecution for a false and malicious libel charged to have been published in the *Kansas City Sun*, a newspaper published and of general circulation in Douglas county, Neb., held that, to charge a felony, the paper must be of general circulation, and that the limitation to one county merely charged a misdemeanor.

2. It is not necessary that the newspaper circulate to any considerable extent, if at all, out of the state, nor that it circulate in every county in the state, but it must extend beyond the county in which it is published, and have a general circulation.

(Syllabus by the Court.)

Error to district court, Douglas county; H. J. DAVIS, Judge.

Ed. A. Koen was convicted of libel, and brings error. Reversed.

Ambrose & Duffie and *Lindsley & Dick*, for plaintiff in error. *Geo. H. Hastings*, Atty. Gen., and *W. S. Shoemaker*, for the State.

MAXWELL, C. J. The plaintiff in error was convicted of criminal libel in the district court of Douglas county, and sentenced to imprisonment in the penitentiary for three years. Section 47 of the Criminal Code provides: "If any person shall write, print, or publish any false and malicious libel of or concerning another, or shall cause or procure any such libel to be written or published, every person so offending shall, upon conviction thereof, be fined in any sum not exceeding \$500, or be imprisoned in the county jail not exceeding six months, or both, at the discretion of the court, and, moreover, be liable to the party injured: provided, that, if said libel is published in a newspaper having a general circulation, the person so offending shall be punished by imprisonment in the penitentiary not less than one, nor more than three, years." The charge in the indictment is "that Ed. A. Koen unlawfully, maliciously, and feloniously did compose, write, and publish, and cause to be composed, written, and published, in a certain newspaper called the *Kansas City Sun*, published and of general circulation in the county of Douglas, in the state of Nebraska, a certain false, scandalous, malicious, and defamatory libel of and concerning the said Nettle Wilson." It will be observed that the charge is that the libel was published in the *Kansas City Sun*, published and of general circulation in the county of Douglas and state of Nebraska. It will be seen that the statute provides for two classes of cases: For printing, publishing, etc., a libel. This, no doubt, applies to ordinary cases. Where there is a conviction under such circumstances, the person found guilty may be imprisoned in the county jail or fined, or