Kentucky Law Journal

Volume 52 | Issue 4 Article 13

1964

Constitutional Law--Sunday Closing Law--Void for Vagueness

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manifested in the new agreement. Application of this argument to one in the defendant's position seems, on the other hand, quite reasonable. It gave up a position on which it could have brought suit and in fact obtained damages. But the "consideration" furnished by the plaintiff, that is, giving up its position that it was under no duty to perform (which in fact as found by the lower court it was bound by its original bid), appears to constitute an exception to the pre-existing duty doctrine.[11]

It has often been said by the more liberal writers that any agreement entered into in good faith should be enforced.[12] It could also be said that equity generally favors good faith compromises.[13] Even so, should we here accept this solution in the light of the possible results? The court obviously put a great deal of weight on the evidence of "hard bargaining" to establish a good faith dispute from which to extract the necessary consideration for the subsequent contract. This means that if the general contractor had acquiesced in the plaintiff's first bid for more money rather than having relied on his natural inclinations to reduce his loss exposure to a minimum, he could have limited his liability to plaintiff's original bid under the doctrine of the *Drennan* and *Alaska Packers'* cases. This hardly seems satisfactory.

The net effect of the principal case is a softening of the pre-existing duty doctrine and a shifting of the burden of loss back to the general contractor. This directly opposes the sound logic expressed by the court in the *Drennan* case that "as between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it."[14]

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CONSTITUTIONAL LAW—SUNDAY CLOSING LAW—VOID FOR VAGUENESS.—The defendant was convicted of violating a Sunday closing statute for operating a department store. The statute[1] excepted from the effect of the Sunday closing law nine specific activities and "work of necessity." On appeal the defendant contended the exception clause, par-

[11] See also 1 Corbin, Contracts § 140 (1963).
[12] 1A Corbin, Contracts § 187 (1963).
[13] *Ibid.*
[14] Drennan v. Star Paving Co., *supra* note 2, at 413, 33 P.2d at 761. Kentucky has no case precisely in point with the principal case although fairly recent cases indicate that its courts might be induced to follow this court's solution. See Hall v. Fuller, 352 S.W.2d 559 (Ky. 1961); Ruckel v. Baston, 252 S.W.2d 432 (Ky. 1952).

[1] Ky. Rev. Stat. 436.160 (1964).

ticularly the "work of necessity" part, made the statute so vague as to be unenforceable. *Held:* Affirmed. Conceding the language to be "loose," the court stated the term "work of necessity," within the context of the Sunday closing statute, was not so vague as to render the law unenforceable. Determination of what is a "work of necessity" is not a jury question but one of law, to be decided by the court in each instance it is raised. The statute was held enforceable and thus constitutional. *Arlan's Department Store of Louisville v. Commonwealth,* 369 S.W.2d 9 (Ky. 1963).

The same exception questioned in the principal case, "work of necessity," appears in the Sunday closing statutes of many states.[2] Until recently, the law has seldom been attacked for vagueness. In the long history of the statutes, courts of the various states have most often been called upon to interpret the meaning of the phrase "work of necessity." But in doing so, the courts themselves have had difficulty with the meaning of the phrase. To illustrate, the following acts were held not to be "work of necessity" within the meaning of the statute: the operation of a grocery,[3] a moving picture theater,[4] a launderette,[5] a sporting goods store,[6] an automobile wash rack,[7] and selling gasoline.[8] Other courts have held as being "work of necessity": the sale of gasoline,[9] operating a restaurant,[10] a railroad,[11] an automobile wash rack,[12] purchasing a home,[13] and the manufacture of carbon black.[14] The question arose in two different New York magistrate courts concerning an automobile wash rack. One court held it was excepted from the Sunday closing statute by the "work of necessity" clause,[15] but the other court declared it was not.[16] Thus the courts have differed. But a reasonable man is supposed to know in advance if a particular work is one of necessity.

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[2] See the concurring opinion of Mr. Justice Frankfurter in McGowan v. State of Maryland, 366 U.S. 420 (1960), and appendix attached thereto.
[3] McAfee v. Commonwealth, 173 Ky. 83, 190 S.W. 671 (1917).
[4] Capital Theater v. Commonwealth, 178 Ky. 780, 199 S.W. 1076 (1918).
[5] People v. Welt, 191 N.Y.S.2d 403 (1959).
[6] Cardinal Sporting Goods Co. v. Eagleton, 213 F. Supp. 207 (E.D. Mo. 1963).
[7] State v. Fairlawn Service Center, 35 N.J. Super. 549, 114 A.2d 487 (1955).
[8] Rhodes v. City of Hope, 171 Ark. 717, 286 S.W. 877 (1926).
[9] Williams v. State, 167 Ga. 143, 144 S.E. 745 (1928).
[10] Commonwealth v. London, 149 Ky. 372, 149 S.W. 852 (1912); Baird v. State, 179 Tenn. 444, 167 S.W.2d 332 (1943).
[11] Commonwealth v. Louisville & N.RR, 80 Ky. 291, 3 Ky. L. Rep. 788 (1882).
[12] State v. Applebaum, 187 N.E.2d 526 (Ohio 1963).
[13] Chadwick v. Stokes, 162 F.2d 132 (3d Cir. 1947).
[14] Natural Gas Products v. Thurman, 205 Ky. 100, 265 S.W. 475 (1924).
[15] People v. Hilton, 119 N.Y.2d 692 (Magis. Ct. 1953).
[16] People v. Gill, 134 N.Y.S.2d 622 (Magis. Ct. 1954).

The "void for vagueness" doctrine is a well-settled rule of law. As noted in the principal case it was stated in *United States v. Capital Traction Company*[17] as follows:

> In a criminal statute the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction. Otherwise there would be lack of uniformity in its enforcement. The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. . . . The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue.

The question is whether the "work of necessity" exception in the Kentucky Sunday closing statute, and similar statutes in other states, meets the test as stated in the *Capital Traction Company*[18] opinion. To illustrate the problem, suppose a Kentucky citizen desires to operate a grocery on Sunday. The Kentucky Court of Appeals in *McAfee v. Commonwealth*,[19] held the operation of a grocery as not being a "work of necessity." In an earlier case, *Commonwealth v. London*,[20] the same court held the operation of a restaurant to be a "work of necessity." There the court stated that "the public, especially the traveling public, of necessity has to obtain something to eat on the Sabbath."[21] In the *McAfee* decision, the *London* case was held not applicable because there was a boarding house, serving regular meals, in the same town as McAfee's grocery. But in many towns of Kentucky there is nothing but the general store. If the grocery is in a town without any kind of restaurant it should be allowed to operate, because "the public, especially the travelling public, of necessity has to obtain something to eat on the Sabbath."[22] This is a reasonable interpretation of the statute. Such a conclusion would mean that what is a "work of necessity" in one locale would not be in another. This violates the rule of uniform statutory construction held necessary in both the *Capital Traction Company*[23] case and the principal case. The statute being susceptible to different interpretations in a myriad of places becomes vague and indefinite. As stated by the dissenting opinion in *Cardinal Sporting Goods Co. v. Eagleton*:[24]

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[17] 34 App. D.C. 592 (1910).
[18] *Ibid.*
[19] 173 Ky. 83, 190 S.W. 671 (1917).
[20] 149 Ky. 372, 149 S.W. 852 (1912).
[21] Commonwealth v. London, 149 Ky. 372, 375 (1912).
[22] *Ibid.*
[23] 34 App. D.C. 592 (1910).
[24] 213 F. Supp. 207, 219 (E.D. Mo. 1963).

> . . . if the meaning of the statute, which on its face is statewide in scope, is so equivocal as to allow the sale of certain items in one section of the state and not in another, then . . . the constitutional guarantee of due process is violated.

In *Natural Gas Products v. Thurman*,[25] in regard to the "work of necessity" clause, the Kentucky Court of Appeals stated:

> In construing and applying the word 'necessity' in such statutes, it is not meant 'a physical and absolute necessity', and the question must be determined according to the particular circumstances of each case, *having regard also to the changing conditions of civilization.* (Emphasis added.)

In the principal case, the court noted that "in the few jurisdictions where the same or comparable phraseology has been tested against the 'void for vagueness' rule the courts have divided." Cited as examples were Pennsylvania,[26] Iowa[27] and New Jersey[28] cases, all holding the law not to be fatally uncertain. The Pennsylvania case,[29] involving a professional baseball team, and the Iowa case[30] are old cases. Reliance upon them today might not give proper weight to "the changing conditions of civilization."[31] This is especially true of the Pennsylvania case. Today professional sports are allowed on Sunday in nineteen states,[32] either by a blanket exception in the statute or local option. They are tolerated in practically every state. Throughout the nation millions relax on Sunday by attending sporting events of all kinds, both professional and amateur. In the New Jersey case,[33] the defendant did not attack the "works of necessity" clause, but instead, assailed a classification of certain prohibited works.

Cited in the principal case as holding such statutes unconstitutional because of vague exception clauses were a 1962 Kansas case[34] and a 1963 Missouri case.[35] In both cases the excepting clause read, "drugs and medicines, provisions, or other articles of immediate necessity." In addition, the court might have cited a 1962 North Carolina case[36] and a 1960 Ohio case.[37] In the North Carolina case, the fatal clause

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[25] 205 Ky. 100, 265 S.W. 475 (1924).
[26] Commonwealth v. American Baseball Club of Philadelphia, 290 Pa. 136, 138 Atl. 497 (1927).
[27] State v. Linsig, 178 Iowa 484, 159 N.W. 995 (1916).
[28] State v. Monteleone, 36 N.J. 93, 175 A.2d 207 (1961).
[29] 290 Pa. 136, 138 Atl. 497 (1927).
[30] 178 Iowa 484, 159 N.W. 995 (1916).
[31] Natural Gas Products v. Thurman, 205 Ky. 100, 265 S.W. 475 (1924).
[32] McGowan v. State of Maryland, 366 U.S. 420 (1960) (Frankfurter opinion).
[33] State v. Monteleone, 36 N.J. 93, 175 A.2d 207 (1961).
[34] State v. Hill, 189 Kan. 403, 369 P.2d 365 (1962).
[35] Harvey v. Priest, 366 S.W.2d 324 (Mo. 1963).
[36] G.I. Surplus Store, Inc. v. Hunter, 257 N.C. 206, 125 S.E.2d 764 (1962).
[37] State v. Woodville Appliance, Ind., 171 N.E.2d 764 (Ohio 1960).

was, "articles necessary for making repairs and performing services." The Ohio statute enumerated certain specific exceptions and "work of necessity." It was held too vague to be enforced.

These more recent cases, voiding Sunday closing statutes because of vague exception clauses, represent the modern view of the courts in this regard. This is not to say the purpose of the Sunday closing statute is bad or that the majority of the people do not want such a law. These recent decisions merely emphasize a demand for exact and definite criminal statutes—not an unreasonable demand. The exception clauses in the Kansas, Missouri and North Carolina statutes, quoted above, were less vague than the one in the Kentucky statute.

The Supreme Court of the United States has long recognized and applied the doctrine of "void for vagueness."[38] But that Court has not been faced with a Sunday closing statute which contained a vague exception as "work of necessity." In the 1961 case of *McGowan v. State of Maryland*,[39] the Maryland Sunday closing statute was attacked as unconstitutional because of vagueness. The law contained specifically a myriad of exceptions for various counties, districts, cities and towns throughout the state. The exception clause was clear and definite, not a broad generalized phrase. It is unfortunate that certiorari was denied the principal case. Striking down the statute because it is vague and indefinite would not imply its purpose is unconstitutional. It would merely be a reiteration, by the Supreme Court, of its long established view that a criminal statute must clearly state and define the elements constituting the offense.

Unfortunately the Kentucky Sunday closing statute does not clearly state and define the elements of the offense. Some work is clearly unnecessary, while in emergency cases other work is necessary. But between these extreme situations are a greater number of less clearly defined works. In this latter area it often becomes difficult for a person to decide if his work is one of necessity. Under the Kentucky statute, a person can know if his work is one of necessity only by subjecting himself to arrest and prosecution. After he is arrested and brought to trial, the judge then decides whether his work is within the phrase "work of necessity." In only a very few cases will the particular work have been previously ruled upon. If there is no prior ruling on the work in question, there is no criteria

[38] Note, *Due Process Requirements of Definiteness in Statutes*, 62 Harv. L. Rev. 77, n.2, where it is stated that the doctrine was first recognized in Waters-Pierce Oil Co. v. Texas (No. 1) 212 U.S. 86, 108-111 (1909); it was first applied to void a statute in International Harvester Co. of America v. Kentucky, 234 U.S. 216 (1914).

[39] 366 U.S. 420 (1960).

or standard to guide the court. The court might evaluate the current attitude of the general public toward permitting the work on Sunday, but in any event there is no choice but to arbitrarily decide on this specific work. The decision of such a case renders the statute no less vague; it clarifies the statute in only one isolated situation. The countless numbers of other persons feeling a need to work or operate their business on Sunday remain without a guide.

As pointed out by the court in the principal case, when there are "conflicting emotions" about a law, "such conflicts are better brought to the floor of the legislature."[40] This is true but it relates to the purpose of the statute, not the form. The constitutionality of the purpose of the Sunday closing statute is conceded. It must, however, meet the test of all criminal statutes; "the elements constituting the offense must be so clearly stated and defined as to reasonably admit of but one construction."[41] The Kentucky Sunday closing statute does not meet this test. "Works of necessity" is not "clearly stated," makes no attempt to "define" anything and may "reasonably admit" to more than "one construction."

Until a statute is enacted in clear and definite terms, the people of the state should not be governed by a law that is unconstitutionally vague. To allow this confers "upon the courts powers both arbitrary, legislative in character and ex post facto in effect."[42] Since there are only nine specific exceptions in the present Kentucky Sunday closing statute, the majority of situations would be covered by the "works of necessity" clause. Voiding this clause would in effect void the entire statute.

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CRIMINAL LAW—INSANITY AND CRIMINAL RESPONSIBILITY—THE STATUS OF THE M'NAUGHTEN PLUS IRRESISTIBLE IMPULSE TEST.—The defendant was convicted of murder and sentenced to death on evidence that he shot and killed his son. The defense was not guilty by reason of insanity. Instructions were given incorporating the M'Naughten (right-wrong) plus irresistible impulse test as a means of determining the criminal responsibility of the accused. The court reviewed the entire record of the case although no bill of exceptions was filed. *Held:* Reversed. The court incorporated the Model Penal Code test

[40] Arlan's Department Store of Louisville v. Commonwealth, 369 S.W.2d 9, 13 (Ky. 1963).
[41] 34 App. D.C. 592 (1910).
[42] Arlan's Dept. Store of Louisville v. Commonwealth, 369 S.W.2d 9, 13 (Ky. 1963).