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Constitutionality of Kentucky Statute Section 2635: Appliances for the Prevention of Venereal Diseases

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NOTES

CONSTITUTIONALITY OF KENTUCKY STATUTE SECTION 2635: APPLIANCES FOR THE PREVENTION OF VENEREAL DISEASES.

1.

As a result of a series of state and federal decisions it is well established that a state, acting under its police power to protect the public health and morals, has a right to regulate the use of birth control measures and the dissemination of knowledge concerning their use.¹ Some states have gone so far as to prohibit completely all birth control measures and the giving of information concerning the use thereof.² Other states have adopted similar statutes but have provided for an exception in cases in which, as a result of a physician's determination, such precautions are deemed necessary for the preservation of the life or health of an individual.³ Other jurisdictions, much more liberal than the two classes mentioned, do not attempt to restrict the use of such methods, but have enacted measures limiting the sale of such goods and/or prescribing certain standards to which all contraceptives sold within the state must conform.⁴ Kentucky comes within this last group.⁵

The Kentucky statute was passed by the Legislature under the title: "An Act relating to the sale, control and licensing of the sale of appliances, drugs and medicinal preparations intended or having special utility for the prevention of venereal

¹ *Com. v. Gardner*, — Mass. —, 15 N. E. (2nd) 222 (1938); *People v. Sanger*, 222 N. Y. 192, 118 N. E. 637 (1918); *State v. Arnold*, — Wis. —, 258 N. W. 843 (1935). *Accord*: *Youngs' Rubber Corp. v. C. I. Lee & Co.*, (2d cir.) 45 F. (2d) 103, 107 (1930); *Lanteen Laboratories v. Clark*, 294 Ill. App. 811, 13 N. E. (2d) 678 (1938).

² Mass. Gen. laws (Ter. Ed.) c. 272, sec. 21, *See*: *Com. v. Gardner*, — Mass. —, 15 N. E. (2d) 222 (1938).

³ N. Y. Penal Law, Consol. Laws, c. 40, sec. 1145. *See*: *People v. Sanger*, 222 N. Y. 192, 118 N. E. 637 (1918).

⁴ Idaho L. (1937) c. 72, sec. 6; Ore. Code Ann. Supp. (1935) sec. 68-2066-2068; Wis. Stat. (1933) sec. 351, 235. *See*: *State v. Arnold*, — Wis. —, 258 N. W. 843 (1935).

⁵ Ky. Stat. (Carroll's 1939 Supp.) sec. 2635c.

diseases.”⁶ Obviously the measure was intended to regulate the public morals incidentally, if at all; for nowhere in the statute appears any restriction upon the purchase of such goods, all persons being allowed to buy, irrespective of age or of whether they are married or single. The title indicates that the purpose of the act is to regulate conditions affecting the public health, and in order to be sustained as such, the statute must be recognized as a valid measure for that purpose, authorized under the general police power of the state.

The legislatures and courts of other states, particularly Wisconsin⁷ and Tennessee,⁸ have considered similar measures as being designed primarily to regulate birth control.⁹ But whether the principal objective be the prevention of venereal diseases or birth control, a reasonable regulation of either comes within the police power of the state.

2.

The Kentucky statute is ostensibly aimed at a protection of the public health, by providing for certain standards to which all appliances used for the prevention of venereal diseases must conform. As set out in Sec. 2635c-7, entitled “Requirements”, it is prescribed that a prophylactic rubber or appliance may not be sold unless it is capable of enduring inflation from one cubic foot of air, free from holes, imperfect rings or blisters, and unpatched. In the recent case questioning the constitutionality of the statute,¹⁰ it was not contended that such requirements in themselves are either ineffective or unreasonable, and the court did not consider that question. Regardless of whether those standards provide for the best possible test of the goods to be sold, it seems obvious that they are at least an attempt in the desired direction, and that a compliance with such provisions will lead to a better grade of products and a consequent step in the progress toward a prevention of venereal diseases—and in the promotion of birth control. Hence the statute is not to be questioned on that basis.

⁶ Ky. Acts, 1938, c. 55.

⁷ Wis. Stat. (1932) sec. 351.235.

⁸ *McConnell v. City of Knoxville*, — Tenn. —, 110 S. W. (2d) 478, 113 A. L. R. 966 (1937).

⁹ *Supra*, n. 1.

¹⁰ *Markendorf v. Friedman*, 280 Ky. 484, 133 S. W. (2d) 516 (1939).

A much more serious issue is presented by a consideration of the limitation upon the right to sell these articles. Sec. 2635c-5, entitled "Retail Licenses", provides that a permit to sell prophylactic rubbers shall be issued only to retail drug stores operated by or employing one or more registered pharmacists, and that sales shall be made only from the prescription counters of such drug stores and by a registered pharmacist.

In the case of *Markendorf v. Friedman*,¹¹ the appellee, who operated a drug sundry department in a department store, contended that the refusal of the State Board of Pharmacy to issue him a license to sell prophylactic rubbers under this statute was a violation of his rights under the Constitution of Kentucky and under the due process clause and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. He alleged the unreasonableness of the classification of druggists having registered pharmacists as being peculiarly qualified to determine whether or not merchandise of the character involved complies with the standards set up by section 7 of this act. In addition to the violation of his rights under the Fourteenth Amendment, he asserted that the statute was in violation of section 3 of the Constitution of Kentucky, which provides that no grant of exclusive privileges shall be made to any man or set of men, except in consideration of public services; and of section 59 of that same instrument, which prohibits special or local legislation. The court held that the classification was not unreasonable.¹²

It is unquestioned that the aforementioned constitutional provisions do not forbid a classification based upon reasonable and natural distinctions,¹³ so the issue to be determined is whether the classification in favor of druggists is manifestly arbitrary and unreasonable so as to exclude some without reasonable basis in fact.¹⁴ If a valid ground for discrimination can be found, or if reasonable minds might differ on the question,

¹¹ *Supra*, n. 10.

¹² The Supreme Court denied certiorari: 60 Sup. Ct. 610, 84 L. Ed. 554 (1939).

¹³ *Louisville R. Co. v. Louisville Fire, etc., Assn.*, 151 Ky. 644, 152 S. W. 799 (1913).

¹⁴ *Com. ex rel. v. Griffen*, 268 Ky. 830, 105 S. W. (2d) 1063 (1937).

then the classification must be upheld, all doubts as to the constitutionality of the act being resolved in its favor.¹⁵

Are registered pharmacists better able to make these tests than is the ordinary merchant? Considering one of the requirements, the court admits that "any person is as qualified as a registered pharmacist to determine whether or not an appliance of this character is nine inches long."¹⁶ Obviously the basis of the classification is not to be found here.

Looking at another of the requisites of such articles, it would be difficult if not impossible to convince the ordinary man that he is not as capable as a registered pharmacist of determining whether an article of this type is free of holes, imperfect rings or blisters, and unpatched. Due to the exceeding thinness, the transparency, and the delicacy of such an appliance, when it is inflated with a quantity of air any imperfection upon its surface should be readily apparent to anyone who gives it a careful examination. No particular pharmaceutical training, nor any scientific instruments or tests should be necessary in determining the presence of defects of this type. Such imperfections are obvious—*res ipsa loquitur*. We must look further for a basis upon which the classification made by the legislature can be founded.

The remaining requirement listed by the statute is that the appliance must be capable of enduring inflation with one cubic foot of air. It is admitted that there is little doubt that the ordinary man or merchant is not capable of measuring the precise amount of one cubic foot of air, but that fact of itself certainly is neither indication nor evidence that a registered pharmacist is able to do so, or even that he is more nearly qualified to make that test than is the average merchant. The court says: "We may assume, and no doubt the Legislature was justified in assuming, that a pharmacist has received some special training along the lines of physics and chemistry, and is in a better situation to make this test than the ordinary man."¹⁷ It is submitted that, in the absence of any direct evidence or other proof upon the issue, and in view of its prior willingness

¹⁵ *Coleman v. Hurst*, 226 Ky. 501, 11 S. W. (2d) 133 (1928); *Shaw v. Fox*, 246 Ky. 342, 55 S. W. (2d) 11 (1932).

¹⁶ *Markendorf v. Friedman*, 280 Ky. 484, 133 S. W. (2d) 516, 520 (1939).

¹⁷ *Ibid.*

to investigate legislative determinations as to fact,¹⁸ the court should have looked to see if the facts as stated by the General Assembly actually existed. Surely the conclusion of the court could not be based upon the idea that it is within the ordinary man's concept of the duties of a druggist that he customarily measures quantities of air.¹⁹

In an effort to determine whether pharmacists can actually make the inflation test of which the General Assembly has deemed them capable, an investigation was made of fifteen drug-stores, chosen at random from the Lexington, Kentucky, city directory, each of which both employed registered pharmacists and sold contraceptives. At this time, some two years after the passage of the statute, every registered pharmacist who was questioned stated that he was not qualified to make such a test. Without exception, each pharmacist admitted that he did not know how such a test would be made, and most of them made the statement: "That is not in my line." The legislative classification on the basis of this requirement is absolutely without foundation.

The conclusion seems inescapable that actually and practically the standards to be met by rubber appliances are such that they may be determined by the average merchant just as well as by a druggist employing a registered pharmacist, and that the peculiar training received by a pharmacist is neither necessary to a proper testing nor of any considerable value therein. Thus, if druggists are no more capable of performing the statutory tests than are other merchants, the statute giving to druggists the exclusive right to sell those goods is not based upon a valid classification. It is arbitrary and unreasonable, and therefore unconstitutional, both as denying to other merchants the equal protection of the laws secured to them by the Fourteenth Amendment to the Federal Constitution, and as being a grant of exclusive privileges other than in consideration of public services, as prohibited by section 3 of the Kentucky Constitution.

¹⁸ For instances in which the Kentucky court has gone behind the legislative determination as to fact, see: *Moore v. City of Georgetown*, 127 Ky. 409, 105 S. W. 905 (1907); *Richardson v. McChesney*, 128 Ky. 363, 108 S. W. 322 (1908); *Willis v. Jonson*, 275 Ky. 538, 121 S. W. (2d) 904 (1938).

¹⁹ Perhaps a filling station operator with an air guage might be better qualified than a registered pharmacist to make this test.

Although a discussion of extra-legislative forces which may have influenced the passage of this statute is not appropriate here,²⁰ yet, outside of the constitutional question heretofore discussed, there are several features of this bill which are deserving of comment. The title of this statute broadly embraces all "appliances, drugs and medicinal preparations having special utility for the prevention of venereal diseases."²¹ In striking contrast to these inclusive terms, the statute itself makes no mention of "drugs and medicinal preparations", but is designed to regulate only one particular article, which appliance comes within the classification "contraceptives", and is more particularly referred to as a "condom". Why the Legislature should confine its regulation of venereal disease preventives to but one of a large class, and this in the face of an all inclusive title to the Act, is unexplained.

It is interesting to consider just how a prosecution for a violation of this statute would proceed if a druggist were ever charged with selling prophylactic rubbers which did not comply with the specifications as set out by the statute. It must be remembered that the court has said that the average man is not capable of making these tests. Then, *a fortiori*, he would not be qualified to say whether someone else had made the same test. In view of this fact, would it be possible to submit to a jury the question of whether the articles involved complied with the statutory requirements? The Legislature has not seen fit to tell us just what mode of procedure would be followed in such an instance.

The whole act causes one to wonder whether the actual working of the measure will not be confined solely to a restriction of advertising of these articles, and a ban upon the sale of prophylactic rubbers by any but the registered pharmacists of the state—leaving the prevalence of venereal diseases in the same condition in which the Legislature found it.

Measures somewhat similar to that taken by Kentucky have been held valid by other courts, though not on grounds exactly like the reasoning given in *Markendorf v. Friedman*. A municipi-

²⁰ In this connection note particularly sec. 4 of the Act, limiting the issue of wholesale licenses to wholesale druggists. This was so palpably unrelated to the averred intention of the act that the court in *Markendorf v. Friedman*, unhesitatingly held it to be arbitrary.

²¹ *Supra*, n. 6.

pal ordinance was upheld by the Tennessee court on the ground that it was a valid regulation of both the public morals and of the public health.²² This Knoxville city ordinance differs from the Kentucky statute in that a definite attempt was made to regulate the public morals by restricting the sale of these devices to persons over eighteen years of age. Further, no attempt was made to set up standards to which all contraceptives must conform. A reading of the ordinance and of the decision in the case referred to lead one to believe that the primary objective in that instance was a regulation of the public morals, and not a control of venereal diseases. The court said:

Certainly, the prohibition of the sale of contraception goods, except by a licensed pharmacist at the prescription counter of a licensed drug-store, or by a licensed physician, and only to persons more than eighteen years of age, tends to preserve public morals, as well as the health and safety of the people of the community, particularly the children and the young men and women. It cannot be doubtful that the indiscriminate sale of contraception goods by peddlers and vending machines, at stores and filling stations, is a menace to the morals and health of the people.²³

The holding in this case shows a possible basis on which the Kentucky statute could be sustained, if it were held to be discriminatory as a health regulation. In view of the fact that the tests outlined in the statute have been shown to be as easily administered by any other merchant as by a registered pharmacist, and hence that a discrimination on such grounds is not reasonable, it is suggested that the more logical ground, and in fact the only basis upon which Kentucky Statute 2635 may rightfully be sustained, is that it is a measure designed to protect the public morals.

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²² *McConnell v. City of Knoxville*, *supra*, n. 8. The Wisconsin legislature made a similar classification in favor of druggists in Wis. Stat. (1932) sec. 351.235, which statute was upheld in *State v. Arnold*, — Wis. —, 258 N. W. 343 (1935) (however the issue as to the reasonableness of the classification was not argued nor considered by the court, the statute being attacked by a filling station operator on the grounds of vagueness of the terms thereof). Oregon has recently passed a statute on this subject, Ore. Code Ann. Supp. (1935) 68-2068, "Contraceptives—Labels and Standards", under which the state board of pharmacy is given power to adopt such standards as may be deemed necessary by the board, like the Kentucky statute, in sec. 68-2066 the right to sell contraceptives is restricted to druggists employing one or more registered pharmacists. At the present writing, no cases could be found construing this statute.

²³ *McConnell v. City of Knoxville*, — Tenn. —, 110 S. W. (2d) 478, 479 (1937).