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Constitutional Law - Sunday Closing Lay - Whether a Statute Forbidding the Sale of Automobiles on Sunday Is Constitutional

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DISCUSSION OF RECENT DECISIONS

CONSTITUTIONAL LAW—SUNDAY CLOSING LAW—WHETHER A STATUTE FORBIDDING THE SALE OF AUTOMOBILES ON SUNDAY IS CONSTITUTIONAL—The recent case of *Courtesy Motors v. Ward*,¹ adds another phase to Sunday closing legislation in Illinois. Courtesy Motors challenged the constitutional validity of a 1961 act of the legislature² which forbids the sale, barter or exchange of automobiles on Sunday. The act imposed a fine³ and a possible suspension of the dealer's license where the provisions were not complied with.⁴ Any citizen could obtain an injunction against a violator of the act.⁵ The legislation which the court dealt with was limited only to the closing of automobile dealers and not to any other fields of enterprise. The trial court upheld the validity of the legislation but on direct appeal to the Supreme Court⁶ the case was reversed. The court decided that the legislative act was unconstitutional under Article 4, Section 22⁷ of the Illinois Constitution.⁸ They declared that the classification made by the legislature bore no rational connection with preserving Sunday as a day of rest, in that observing Sunday as a day of rest is not unique to the automobile industry, for no reasons were shown why legislation should apply only to the automotive industry.

It would be well at this time to consider the grounds on which Courtesy contested the legislation and to dispel certain issues which were conceded. The main thrust of Courtesy's argument centered around Section 22 of Article 4 of the Illinois Constitution and the Fourteenth Amendment of the United States Constitution. Courtesy did not contend that the act infringed on their freedom of religion⁹ in view of four recent United States

¹ 24 Ill. 2d 82, 179 N.E.2d 692 (1962).

² Ill. Rev. Stats., 1961, ch. 121½, par. 282, § 2, provides that it is unlawful for any person to "keep open, operate or assist in keeping open or operating any place or premises or residences, whether open or closed, for the purpose of buying, selling, bartering or exchanging . . . any motor vehicle, whether new or used, on the first day of the week, commonly called Sunday." Eleven other states have enacted laws of a similar nature banning the sale of new or used automobiles at retail on Sunday. Colorado Revised Statutes, 1953, § 13-20-1 to 13-20-3; Connecticut General Statutes Revised, 1958, § 53-301; Florida Statutes Annotated, 1957, § 320.272 [2nd Hand Dealers]; Burns Indiana Statutes Annotated, 1956, Replacement Volume, § 10-4305; Michigan Statutes Annotated, 1960, § 9.2701 through 9.2703; Minnesota Statutes Annotated, § 168.275; New Jersey Statutes Annotated, § 2A:171-1.1; Oklahoma Statutes Annotated, T.21, § 917 to 19; Purdom's Pennsylvania Statutes Annotated, 1945-1957, T.18, § 4699.9; Rhode Island General Laws, 1956, § 31-5-19; and West's Wisconsin Statutes Annotated, § 218.01(3)(a)21.

³ Ill. Rev. Stats. 1961, chap. 121½, par. 283, § 3a.

⁴ *Id.* at § 3b.

⁵ *Id.* at § 4.

⁶ Direct appeal is provided for in all cases where a construction of the constitution is involved. Ill. Rev. Stats. 1961, chap. 110, § 75(1).

⁷ Ill. Const., Art. IV, § 22, provides a list of subjects upon which there shall be no special legislation, none of which are relevant here. It then concludes with a general provision that "in all other cases where a general law may be made applicable, no special law shall be enacted."

⁸ *Supra*, n. 1 at 846.

⁹ U.S. Const., Amend. 1, prohibits Congress from enacting laws designed to establish an official religion.

Supreme Court opinions¹⁰ which held that the closing of certain activities on Sunday did not interfere with an individual's right under the First Amendment.

Although some doubt exists as to its correctness, which will be discussed later, the opinion of the Court can only be appraised in the light of the background of Sunday legislation in Illinois. Unlike the great majority of other states,¹¹ Illinois has never had a general closing law. Indeed, even taverns and saloons can operate freely on Sundays so long as local authorities grant their approval;¹² and such approval has been granted in the City of Chicago.¹³ Prior to the new Criminal Code,¹⁴ which has only a general disorderly conduct prohibition, the only statute which even came close to being a general Sunday law was a provision in the former Criminal Code¹⁵ which merely prohibited the disturbance of the peace on Sunday by labor, noise, route or amusement.

Before an analysis can be made under Section 22 of Article 4, the first question is whether Sunday closing is within the sphere of the police power? The Court has held in the affirmative.¹⁶ Section 22 of Article 4 provides a limitation on the exercise of the police power. Its requirements are that the classification rests upon some attribute marking a class as a proper object for special legislation. In *Rudolph Express Co. v. Bibb*,¹⁷ the Court held that when a statute is assailed under this section it will use the same test as in Fourteenth Amendment cases. This test does not prohibit legislative classification, but does require that the legislative classification rest upon a reasonable basis and apply uniformly to all members of the class upon which it operates.¹⁸ The test of reasonableness pervades the opinions of the Supreme Court.

The first case in Illinois dealing with Sunday closing was *Eden v. People*,¹⁹ in which a Sunday closing law applied only to barbers. The Court struck down the statute on the ground that it constituted class legislation. The court aptly stated that the legislation was not calculated to promote the health, safety and morals of the community. *Eden* was careful to point out that classification *per se* is not unconstitutional, but to be constitutional

¹⁰ *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown Inc. v. McGinley*, 366 U.S. 582 (1961); *Braunfield v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617 (1961).

¹¹ A complete list of statutes is contained in Appendix II to the opinion of Mr. Justice Frankfurter in *McGowan v. Maryland*, 366 U.S. 420, 551-60 (1961).

¹² Ill. Rev. Stats. 1961, Ch. 43, § 129.

¹³ Municipal Code of Chicago, § 147-13.

¹⁴ Ill. Rev. Stats. 1961, Ch. 38, Art. 26.

¹⁵ Ill. Rev. Stats., 1959, Ch. 38 § 550.

¹⁶ *McPherson v. Village of Chebanse*, 114 Ill. 46, 28 N.E. 454 (1885). See also *McQuillin*, *Municipal Corporations*, § 24.188; 50 *Am. Jur.*, *Sundays & Holidays*, § 9; 83 *C.J.S.*, *Sunday*, § 3D.

¹⁷ 15 Ill. 2d 76, 79-80, 153 N.E. 2d 820 (1958).

¹⁸ See also: *People v. Wilcox*, 237 Ill. 421, 423-4, 86 N.E. 672 (1908).

¹⁹ 161 Ill. 296, 43 N.E. 1108 (1896).

the classification must bear some relation to the health, safety and morals. The court felt that the legislature could not single out a class harmless in itself.²⁰ Then followed the cases of *City of Springfield v. Richter*²¹ and *City of Clinton v. Wilson*²² which upheld general Sunday closing ordinances similar in nature, which exempted from its operation certain enumerated exceptions. The Court rested its decisions on Section 22 of Article 4, stating that there was a justification for the ordinances because there was a substantial difference between the classes of employment prohibited and those excepted. Next to come before the court was *City of Marengo v. Rowland*²³ in which the *Eden* decision was cited and followed. The court struck down an ordinance requiring the closing of barber shops only on Sunday. Forty-two years after *Eden* came *City of Mt. Vernon v. Julian*²⁴ which clarified the Sunday legislation phase to a great extent. The ordinance in question was of the general variety, but contained numerous exceptions. The court held the ordinance to be unconstitutional on the ground that the distinctions made in the ordinance were arbitrary and without relation to the health, safety, morals and welfare of the community. The court expressly overruled the *City of Springfield* and *City of Clinton* line of cases, stating that not even the legislature could pick and choose the categories, but the distinctions between classes prohibited and those excepted must bear a relation to the health, safety, morals and welfare of the community.²⁵

The next cases to come before the court were *Humphrey Chevrolet v. Evanston*²⁶ and *Pacesetter Homes Inc. v. South Holland*.²⁷ A dissection of these cases along with the *Courtesy* decision lends credence to the view that the court either failed to give complete recognition to *Humphrey* and *Pacesetter* or reverted to the historical policy of Illinois that restraints on the freedom of enterprise should be kept at a minimum. At the very outset the court had by implication, at least, already determined that the automobile sales industry is a proper subject for the legislative exercise of sovereign police power and that an enactment, requiring the Sunday closing of that industry, does in fact protect the public health, safety and morals and promotes the general welfare. In *Humphrey* the Court examined the validity of a municipal Sunday closing ordinance. It was comprehensive in nature and, with certain exceptions, prohibited the operation of retail and whole-

²⁰ *Supra*, n. 19 at 308.

²¹ 257 Ill. 578, 101 N.E. 192 (1913).

²² 257 Ill. 580, 101 N.E. 192 (1913). The ordinance applicable to these cases read: "Whoever shall on Sunday keep open or permit to be kept open, his place of business, or shall pursue his daily labor or occupation within said city, shall on conviction be fined not less than \$10 nor more than \$50: this section shall not be applicable to persons who conscientiously observe some other day of the week as the Sabbath, nor in cases of necessity or of charity, nor to hotels, eating houses, drug stores, tobacco stores, barber shops or livery stables."

²³ 263 Ill. 531, 105 N. E. 285 (1914).

²⁴ 369 Ill. 447, 17 N. E. 2d 52 (1938).

²⁵ *Supra*, n. 24 at 452.

²⁶ 7 Ill. 2d 402, 131 N. E. 2d 70 (1955).

²⁷ 18 Ill. 2d 247, 163 N. E. 2d 464 (1959).

sale businesses on Sunday.²⁸ The plaintiff, an automobile dealer, challenged the constitutional validity of this enactment. The Court observed that the ordinance constituted a reasonable exercise of police power and that the plaintiff failed to advance any persuasive reasons to show that it was unreasonable as to him. Accordingly, the validity of the ordinance was upheld. In *Pacesetter* the Court considered a municipal Sunday closing ordinance, which was directed at business activity generally with certain specified exemptions. One of the plaintiffs was engaged in the construction and sale of homes and complained that the ordinance prevented it from merely exhibiting its houses or having them open for inspection on Sundays. The Court stated that there was no showing that this business affected or endangered the public health, safety, morals or general welfare. Since harmless as well as harmful businesses were prohibited, the validity of the entire ordinance could not be sustained. An appraisal of *Humphrey* in the light of the decision in *Pacesetter* leads only to one conclusion—the Court was obliged to determine that the Sunday closing of an automobile agency did, in fact, promote the health, comfort, safety or welfare of society in order to sustain the validity of the Evanston ordinance. If the automotive sales industry was not detrimental to the public health, safety and morals, the decision in *Pacesetter* would dictate a contrary result. The Evanston ordinance then would have included a harmless business. *Pacesetter* teaches that an ordinance, which prohibits harmless as well as harmful businesses, is arbitrary and invalid. If that doctrine be sound, the Court could not have sustained the Evanston ordinance if the Sunday operation of an automobile agency did not affect or disturb the public welfare. If, according to the above cases, the auto industry was harmful, a separate classification as to them would still meet the mandates of the *Eden* decision because there would be a reasonable relation to the health, safety and morals of the community.

The rationale in *Courtesy* when read with *Humphrey* and *Pacesetter* seems to indicate a tendency by the Court to sustain Sunday legislation only (a) when it includes all harmful industries and (b) does not include any harmless industries.

The Illinois opinion in this case appears to be the minority view. Six states have upheld Sunday legislation dealing solely with automobile dealers.²⁹ All the cases agree that such legislation constitutes a reasonable exercise

²⁸ *Id.* at 465.

²⁹ *Mosko v. Dunbar*, 135 Col. 172, 309 P. 2d 581 (1957); *Tinder v. Clarke*, 238 Ind. 302, 149 N. E. 2d 808 (1958); *Diamond Auto Sales v. Erbe*, 251 Iowa 1330, 105 N.W. 2d 650 (1960); *Irishman's Lot v. Cleary*, 338 Mich. 662, 62 N.W. 2d 668 (1954); *Stewart Motor Co. v. Omaha*, 120 Neb. 776, 235 N.W. 332 (1931); *Gundaker Motors v. Gassert*, 23 N.J. 71, 127 A. 2d 566 (1956). *Gundaker* is significant for an additional reason. An appeal was prosecuted to the Supreme Court of the United States pursuant to the provisions of 28 U.S.C.A. 1257(2). In a *per curiam* decision, that Court dismissed the appeal *for want of a substantial federal question*. *Gundaker Motors Inc. v. Gassert*, 354 U.S. 933 (1957). The parties were in that Court and the matter was considered *on the merits*. *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 108 (1912). The dismissal for want of a substantial federal question should settle any concern over violation of federal constitutional provisions.

of the police power. The two states which have held that similar types of legislation were unconstitutional were Florida and Missouri. Decisions in these two states can be readily distinguished. In *McKaig v. Kansas City*,³⁰ the Missouri Supreme Court held a similar statute unconstitutional. However, Missouri has a peculiar constitutional provision which provides that whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on the subject.³¹ The Court pointed out that New Jersey, Colorado and Indiana had sustained a similar statute as being a question for the legislative judgment but that under the peculiar provision of the Missouri Constitution, the Court was not bound by the legislative judgment. In Illinois, the Court is limited to a review of the reasonableness of the legislative determination. The person attacking the ordinance carries the burden of proof that the statute does not rest on a reasonable basis and no state of facts can be readily conceived to justify it.³²

In *Moore v. Thompson*,³³ the Florida Court struck down a similar type of legislation on the ground that it was against the public policy of the state.³⁴ The case is clearly distinguishable. In Illinois under *Humphrey* the public policy of the state permits public closing of businesses on Sundays.

Today, the automobile has become a definite and well established part of our way of life. Its use, license, registration, taxation, insurance, theft and many other related matters have received special legislative recognition and attention. Certainly the legislature has treated the motor vehicle as a special type of business.³⁵ The public has accepted it as such. To hold that it is arbitrary and unreasonable action on the part of the legislature to place motor vehicle dealers in a classification separate and apart from merchants in general, would be to close our eyes to reality. To argue that similar abuses as exist in the auto industry are present in other businesses open on Sunday is to lose sight of the problem.³⁶ The legislature is under no duty to extend regulatory measures to all fields in which there may be abuses. It may confine its restrictions to those classes of cases where the need is deemed to be

³⁰ 363 Mo. 1033, 256 S.W. 2d 815 (1953).

³¹ Missouri Const., Art. III, § 40.

³² *Union Cemetary Association v. Cooper*, 414 Ill. 23, 110 N.E. 2d 239 (1953).

³³ 126 So. 2d 543 (Fla., 1960).

³⁴ *Supra*, n. 33 at 551-2. "We are not unmindful of the decision of other states set forth in the opinion and judgment of the trial court holding similar acts of other states to be valid and constitutional. *Most of these cases, and notably the cases from New Jersey, Indiana and Michigan, plainly indicate the basis for upholding such acts to be the public policy of such states for closing businesses on Sunday. Such, as we have pointed out, is not the public policy of this state. The views of the courts of other states simply do not coincide with the view we entertain of this subject.*" (Emphasis supplied)

³⁵ Ill. Rev. Stats. 1961, Ch. 95½, §§ 5-101, 5-102.

³⁶ *Tinder v. Clarke*, 238 Ind. 302, 149 N.E. 2d 808 (1958) (because of competitive conditions few dealers require all to be open and the noise and disorder created by dealers being open on Sunday); *Gundaker Motors v. Gassert*, 23 N.J. 71, 127 A. 2d 566 (1956) (some employees denied a day of rest and traffic problems created by the large amount of motor vehicles visiting showrooms).

the clearest.³⁷ To remedy evils, the State legislature may move one step at a time.³⁸ It may operate in one field and supply a remedy while it neglects others.

JOSEPH V. RODDY

CONFLICT OF LAWS—CORPORATIONS—WHETHER THE COURT OF THE FORUM MAY DISREGARD SUCCESSORSHIP TO A CAUSE OF ACTION FOR A MULTISTATE LIBEL VALIDLY ASSIGNED ELSEWHERE BY AN UNINCORPORATED ASSOCIATION TO A NEWLY FORMED CORPORATION INTO WHICH IT HAS MERGED AND REFUSE TO PERMIT SUIT BY THE CORPORATE SUCCESSOR BASED ON THE FORUM'S DOMESTIC SUBSTANTIVE LAW—In *Association for the Preservation of Freedom of Choice, Inc. v. New York Post Corporation*,¹ a New York court had before it a novel and important question in the area of conflict of laws involving increasingly significant problems in the multi-state libel situation.

The defendant published a libel about an unincorporated group called Association for the Preservation of Freedom of Choice, which had members in a number of states and the District of Columbia, on May 14, 1959. The defendant's newspaper with the libelous article was circulated into various states, including New York, and the District of Columbia. In August, 1959, the unincorporated organization, pursuant to a prior unanimous agreement that it should incorporate in the District of Columbia, and that upon incorporation the new corporation should succeed to all of the group's members, property, and claims, incorporated the group under the same name in the District of Columbia by having three residents of District who were members of the unincorporated association secure a charter with the same name and purposes as the unincorporated group pursuant to District of Columbia law from the Superintendent of Corporations there. Thereupon, the membership of the unincorporated group merged into the corporation, and the unincorporated group ceased to exist as a separate organization.

In May, 1960, the corporation brought suit as plaintiff in its own name as successor to the unincorporated group for libel against the defendant newspaper. The court dismissed the claim. It held that although a valid successorship might have been created in the District of Columbia, the question presented was "the ownership of the claim or who may sue under the law of the forum which governs the question of the capacity to sue." Since it held that a libel claim was not assignable in New York, the court concluded that "the resident of another State cannot avail itself of

³⁷ *Godlin v. Auditor of Public Accounts*, 414 Ill. 89, 98, 110 N.E. 2d 234 (1953).

³⁸ *McGowan v. Maryland*, 366 U.S. 420 (1961).

¹ 35 Misc. 2d 65, 228 N.Y.S.2d 767 (1962).