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Sunday Observance Laws

In a recent case, the United States District Court for the District of Massachusetts held that the Massachusetts “Lord’s Day” statute denied due process of law by depriving arbitrarily the owner of a kosher supermarket of its property and by depriving its Orthodox Jewish customers, and rabbis charged with the duty of inspecting kosher markets to insure compliance with Jewish dietary laws, of their liberty.

These developments in the law warrant a reexamination of the West Virginia law relating to labor on Sunday. The purpose of this paper will be to discuss the West Virginia statute, particularly with reference to the 1959 amendment thereto and to consider the constitutionality thereof.

This West Virginia statute, found in W. Va. Code ch. 61, art. 8, § 17 (Michie 1955), provides in part:

“If any person, on a Sabbath day, be found laboring at any trade or calling, or employ his minor children, apprentices, or servants in labor or other business, except in household or other work of necessity or charity, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifteen dollars for each offense; and every day such minor child, servant or apprentice is so employed shall constitute a separate and distinct offense....”

In 1959 the West Virginia legislature amended the statute to provide specific exemptions for certain enumerated businesses and added the following proviso:

‘Provided... no forfeiture shall be incurred or conviction had under the preceding section by or of any person who conscientiously believes that the seventh day of the week ought to be observed as a Sabbath and actually refrains from all secular business and labor on that day, provided he does not compel any apprentice or servant not of his belief to do secular work or business on Sunday, and does not on that day disturb any other person in his observance of the same.”

It will be helpful to examine these statutes in the light of West Virginia and Virginia Supreme Court decisions. Sunday, as used

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2 See also: Two Guys From Harrison, Inc. v. Furman, 107 A.2d 351 (N.J. 1960); Two Guys From Harrison, Inc. v. McGuily, 266 F.2d 427 (3rd Cir. 1959).
in the decisions, is from 12:00 P. M. Saturday night until 12:00 P. M. Sunday night.\textsuperscript{4} Persons stated in the statute includes corporations as well as natural persons.\textsuperscript{5} Labor means physical or mental toil, bodily or intellectual exertion. A man's calling is his usual occupation, vocation or business, and trade is any occupation or employment pursued as a calling.\textsuperscript{6} Once an activity is found to be prohibited by the statute, it becomes immaterial whether it was performed publicly or privately.\textsuperscript{7} Likewise, it is immaterial that the person charged was working for no compensation or selling goods at cost.\textsuperscript{8} The statute applies to every class of labor at every trade, calling or business for which a specific exception is not provided in the statute.\textsuperscript{9} The only limitation that can be found is by way of dictum in a federal court decision\textsuperscript{10} which held that one transaction, unconnected by continuity with other transactions of a like nature, cannot be laboring at a trade or calling. This case is not controlling since the problem before the court was to determine the validity of a conveyance on Sunday, not prosecution for violation of the Sunday statute. It may be of interest to note that, at common law, a person had the right to engage in works of labor and to prosecute generally his usual business or calling on Sunday.\textsuperscript{11} Thus, the offense is basically statutory.

Courts have generally taken the position that the purpose of this type statute is to protect persons from physical and moral debasement of uninterrupted labor.\textsuperscript{12} Its object is to make Sunday a day of rest.\textsuperscript{13} The first problem to be considered is a determination of the acts exempted from operation of the law, namely "works of necessity." What constitutes necessary labor is a question of fact to be determined by the jury.\textsuperscript{14} This is to be decided by the juries in the respective localities as reflective of the community opinion of the moral fitness and propriety of the work.\textsuperscript{15} Instructions given the jury on this question should explain that the work

\textsuperscript{4} Jeffries v. Commonwealth, 113 Va. 773, 75 S.E. 90 (1912).
\textsuperscript{6} Crook v. Commonwealth, 147 Va. 593, 136 S.E. 565 (1927).
\textsuperscript{7} Raines v. Watson, 2 W. Va. 371 (1888).
\textsuperscript{8} Crook v. Commonwealth, 147 Va. 593, 136 S.E. 565 (1927).
\textsuperscript{9} Pirkey Bros. v. Commonwealth, 134 Va. 713, 114 S.E. 764 (1922).
\textsuperscript{10} Dunlop v. Baker, 239 F. 193 (4th Cir. 1916); cert. denied 242 U.S. 650 (1917).
\textsuperscript{11} Woolridge v. Woolridge, 69 W. Va. 554, 72 S.E. 654 (1911).
\textsuperscript{12} Francisco v. Commonwealth, 180 Va. 371, 23 S.E. 2d 234 (1942).
\textsuperscript{14} State v. Knight, 29 W. Va. 340, 1 S.E. 569 (1887).
\textsuperscript{15} Williams v. Commonwealth, 179 Va. 741, 20 S.E. 2d 493 (1942).
need not be of physical and absolute necessity, but the problem is to determine the moral fitness or propriety of the work or labor done under the circumstances of the particular case. Each case must stand or fall on its own fact situation and it is not sufficient that the work is merely desirable. Of utmost importance is the fact that the determination of work of necessity is flexible, that is, it need not be identical with the definition given at the time the original act was passed. It becomes obvious, therefore, that what constitutes a work of necessity will vary from time to time and from locality to locality.

As applied to particular activities, the courts have held that taking care of goods and safety and securely keeping them after they are received do not violate the statute. Nor does the pumping of an oil well where it is shown that the owner will suffer material and permanent loss and injury by ceasing the process. The 1959 amendment to the West Virginia statute states that no conviction shall be had for transportation of the mail, or of passengers and their baggage carried by any mode of public conveyance, for running of any railroad train, tractor car or system, automobile or other motor car carrying passengers for pleasure or hire, steamboat or other boat used in carrying passengers or freight, garages, gasoline service stations, manufacturing establishments, or any of their employees where the process of manufacture requires continuous operation and where the employees are on rotating shift schedules on the Sabbath day, or for the operation of, or labor in, grocery stores or other similar establishments engaged primarily in the sale of food products for human consumption. This amendment has removed many of the doubts heretofore existing. At this point, attention is called to the exemption of grocery stores, thus eliminating attack, as in the Massachusetts case, by a grocery store owner. Activities found to be in violation of the Sunday law include selling of soft drinks, keeping open a cave and charging admission thereto, and the playing of professional baseball where the players

18 Lakeside Inn Corp. v. Commonwealth, 134 Va. 696, 114 S.E. 769 (1922).
18 Ibid.
21 State v. McBee, 52 W. Va. 257, 43 S.E. 121 (1902).
are paid a regular salary, although no extra compensation is given for playing on Sunday.\textsuperscript{25} It may be added that the latter case held that the playing of a pure game of sport is not violative of the statute. The question of playing professional baseball, football and other sports raises speculation whether or not such is in violation of the Sunday laws at the present time. The Virginia case cited was decided in 1927 and, in view of the flexible and elastic definition discussed previously, may have limited application at the present time.

Sunday laws are penal in nature and conviction must be based on presentment or indictment by a grand jury.\textsuperscript{26} The burden of proof is on the state to show that the activity complained of is not household or other work of necessity or charity.\textsuperscript{27} Juries for trying the offense are formed basically the same as juries in a civil case.\textsuperscript{28}

Another source of litigation based upon labor on the Sabbath arises under city ordinances. The West Virginia court has held that a city can pass an ordinance prohibiting labor on Sunday where its charter empowers the council to pass ordinances to protect the health, property, lives, decency, morality, cleanliness and good order of the city and its inhabitants.\textsuperscript{29} Such ordinances can also provide for penalties different from those set out in the state statute.\textsuperscript{30} However, the ordinance is void if it fails to exempt persons and corporations exempt by the statute.\textsuperscript{31}

Constitutional problems in this area of the law are very unsettled. Only one instance is found in which the constitutionality of the Virginia statute has been questioned.\textsuperscript{32} That decision would have no application to the present problem because the allegation was that the statute was so indefinite as to constitute denial of due process. The West Virginia statute appears never to have been tested on constitutional grounds. Two important aspects are to be considered in this area; the object of the statute being to provide a day of rest as previously stated, and the fact that it is enforced as a civil institution, not as a religious observance.\textsuperscript{33} Although the

\textsuperscript{25} Crook v. Commonwealth, 147 Va. 593, 136 S.E. 565 (1927).
\textsuperscript{26} State v. Harr, 77 W. Va. 637, 88 S.E. 44 (1916).
\textsuperscript{27} State v. McBee, 52 W. Va. 257, 43 S.E. 121 (1902).
\textsuperscript{29} State v. Wertz, 91 W. Va. 622, 114 S.E. 242 (1922).
\textsuperscript{30} Ibid.
\textsuperscript{31} Block v. Crockett, 61 W. Va. 421, 56 S.E. 826 (1907).
\textsuperscript{32} Broad-Grace Arcade Corp. v. Bright, 48 F.2d 348 (E.D.Va. 1931); aff'd, 284 U.S. 588 (1931).
\textsuperscript{33} Pirkey Bros. v. Commonwealth, 134 Va. 713, 114 S.E. 764 (1922).
cases thus holding are Virginia cases, it seems very probable that the West Virginia court would be in accord. It may well be noted here that, in the Massachusetts case, a state court had held that the purpose of the state statute was to provide a day of rest and not to enforce it as a religious observance.\textsuperscript{34} The federal court held that it was not bound by this characterization by the state court on the authority of an earlier United States Supreme Court decision.\textsuperscript{35} The court also held that it could consider the question of interference with religion as the first amendment prohibitions respecting establishment of religion were incorporated into the fourteenth amendment, thus made applicable to state action.\textsuperscript{36}

To compare the statute in the principal case with that of West Virginia is to compare the original of a writing to the carbon copy. They are identical. In the Massachusetts act, Sunday is referred to as the Lord's Day, in that of West Virginia as the Sabbath. For present purposes the historical and religious differences between the Sabbath and Sunday need not here be discussed. Of more importance is the identical provisions exempting persons who conscientiously believe the seventh day of the week to be the Sabbath. The wording of this provision in both statutes is exactly the same. A differentiating factor between the two may be a decision by the Massachusetts court that this provision does not excuse one of the separate offense of opening his shop on Sunday.\textsuperscript{37} No West Virginia cases are found so holding. However, the provisions in the Massachusetts exemption refers to the general prohibition as does the West Virginia proviso. As stated above, the sections of the two acts to which reference is made are identical. Whether this distinction is sufficient to uphold the constitutionality of the West Virginia law is at the most doubtful.

The basic problem here confronted is to determine whether the West Virginia statute will be held to have religious overtones. In the Massachusetts case, the court placed much emphasis on the fact that particular exemptions covered activities which "are certainly not works of necessity," to use the words of the court. Also, the fact that these activities were not to be carried on during certain hours nor at certain places was relied upon by the court in characterizing the law. The 1959 amendment to the West Virginia act

\textsuperscript{34} Commonwealth v. Has, 122 Mass. 40 (1877).
\textsuperscript{35} City of Cleveland, Ohio v. Bowers, 349 U.S. 143 (1955).
\textsuperscript{36} Thomas v. Collins, 323 U.S. 516 (1945).
\textsuperscript{37} Commonwealth v. Has, 122 Mass. 40 (1877).
provides that the exempt activities shall not be carried on within three hundred feet of a church during the customary hours for morning or evening services conducted therein. This provision may well bring the statute within the consideration of the federal court and place religious considerations in a position dominantly motivating passage and enforcement of the statute. Another important element in the chain of characterization is the intent of the legislature in enactment of the statute in the first instance. Beyond all doubt, at the time Sunday "Blue Laws" were introduced to this country, the main purpose was to compel appropriate observance of the Sabbath or Sunday. History may well reveal that this is the purpose behind the original West Virginia law.

The Sunday "Blue Laws" are under attack. West Virginia's statute, having been recently amended, may avoid some of these attacks but may yet have constitutional problems warranting judicial examination. The United States Supreme Court in April, 1960, noted probable jurisdiction to review the Massachusetts case. Will these laws withstand attack on constitutional grounds? The question is interesting. The answer may be even more so. In any event, a comprehensive decision by the United States Supreme Court will serve well to clear many problems that have troubled lawyers, legislators, law enforcement officials and courts through the years.

J. F. W., Jr.

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33 Gallagher v. Crown Kosher Supermarket, Inc. 28 U.S.L. Week 3317 (No. 532, probable jurisdiction noted.)