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Supermarket Sale of Drugs and Medicines Enjoined

In a suit by the State of Minnesota[1] to restrain a supermarket chain and a "rack-jobber"[2] from selling patent and proprietary medicines in violation of the Minnesota Pharmacy Law,[3] the state supreme court reversed the trial court's holding that injunctive relief was not available and granted a new trial. Among the items involved were Alka-Seltzer, Anacin, Bromo-Seltzer, Bufferin, Pepto-Bismol, Pinex, and Sal Hepatica. The plaintiffs alleged that the sale of these items was widespread throughout the state and that it would have been expensive, burdensome, and almost impossible to restrain the sale by individual criminal prosecutions.

It has often been stated that equity will not enforce the criminal law,[4] but equity has nonetheless invaded the field of criminal law[5] when it could do so under either of two principal exceptions: (1) by use of its power to abate nuisances affecting the public health or welfare, even though a penal remedy is provided; and (2) where a criminal statute expressly provides for an injunction.[6] As to the first basis, it is clear that the extent of equity's power will depend on the definition of the word "nuisance." The definition gradually has been expanded from its early narrow common law meaning to an ill-defined, broad concept which gives equity courts a "free pass" to enter the criminal law area whenever any possible danger to public health or welfare can be found.[7] It has been said that "the elasticity

1. State v. Red Owls Stores, Inc., —Minn.—, 92 N.W.2d 103 (1958).
2. A "rack-jobber" is a wholesaler who usually sells on consignment and often packages the merchandise in bags for display on a peg-board or rack.
3. MINN. STAT. ANN. §151.15 provides:

> It shall be unlawful, for any person to compound, dispense, vend, or sell at retail, drugs, medicines, chemicals, or poisons in any place other than a pharmacy, except as provided in this chapter.
>
> No proprietor of a pharmacy shall permit the compounding or dispensing of prescriptions or the vending or selling at retail of drugs, medicines, chemicals, or poisons in his pharmacy except under the personal supervision of a pharmacist or of an assistant pharmacist in the temporary absence of the pharmacist.

MINN. STAT. ANN. §151.25 provides:

> It shall be unlawful for any person engaged in the business of selling at wholesale, or his agent, to sell drugs, medicines, chemicals, or poisons to other than a pharmacy, except as provided in this chapter.

4. People ex rel. Bennett v. Laman, 277 N.Y. 368, 14 N.E.2d 439 (1938).
5. Meyer v. Seifert, 216 Ark. 293, 225 S.W.2d 4 (1949); In re Debs, 158 U.S. 564 (1895); Cranford v. Tyrrell, 128 N.Y. 341, 28 N.E. 514 (1891); Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927). Also see POMEROY, 4 EQUITY JURISPRUDENCE 953 (5th ed. 1941), and Caldwell, *Injunctions Against Crime*, 26 ILL. L. REV. 259 (1931).
6. State ex rel. Attorney General v. Marshall, 100 Miss. 626, 56 So. 792 (1911). People v. Photocolor Corp., 156 Misc. 47, 281 N.Y.Supp. 130 (1935), is an example of a case involving statutory injunction ("Blue Sky Laws"). Also see note, 24 CORNELL L.Q. 118 (1938).
7. MCCLINTOCK ON EQUITY 443 (2d ed. 1948).

of the word nuisance permits courts to stretch it to cover almost any situation which threatens injury to interests of the public."[8] Some jurisdictions have retained the common law requirement of a threat of irreparable harm to the claimant's property before invoking injunctive relief,[9] but many others deny the necessity of a property interest.[10] A justification for the abandonment of the property intérest requirement was advanced in an Illinois case[11] where it was said:

> Maintenance of the public health, morals, safety and welfare is on a plane above mere pecuniary damages although not susceptible of measurement in money, and to say that a court of equity may not enjoin a public nuisance because property rights are not involved, would be to say that the state is unable to enforce the law or protect its citizens from public wrongs.[12]

The effect would then seem to be that the criminality of the act sought to be enjoined will operate only to increase the difficulty of proving inadequacy of the remedy at law, which difficulty the complaining party may nonetheless overcome by a mere preponderance of the evidence, so long as one of the above mentioned exceptions under which the courts will enter the criminal area is present.

The issues raised in the present case were centered about the trial court's finding that the criminal prosecution provided for in the statute was exclusive and its further finding that there had been no showing of a danger to public health. Underlying the case was the fact that here was involved not an isolated act or course of action or merely one or a few individuals, but rather a problem, nationwide in significance, concerning a statewide industry. The issue squarely presented was whether the sale of proprietary and patent medicines should be limited to drugstores or whether they should be permitted to be sold elsewhere. If the court felt that the sale of these items should be limited to drugstores, then it could utilize the public nuisance theory as a means of effecting the desired results. The court did uphold the sales restriction but its reasoning was inconclusive.

8. Caldwell, *Injunctions Against Crime,* 26 ILL. L. REV. 259, 268 (1931). Also see New Orleans v. Liberty Shop, Ltd., 157 La. 26, 101 So. 798 (1924) (enforcement of zoning laws); State v. Knudson, 121 Neb. 270, 236 N.W. 696 (1931) (control of disease among animals]; State ex rel. Indiana State Board of Dental Examiners v. Boston System Dentists, 215 Ind. 485, 19 N.E.2d 949 (1939) (illegal practice of dentisty); In re Dawkins, 289 N.Y. 553, 43 N.E.2d 530 (1942) (illegal practice of law); State v. Howard, 214 Iowa 60, 241 N.W. 682 (1932) (illegal practice of medicine); Funk Jewelry Co. v. State ex rel, Le Prade, 46 Ariz. 348, 50 P.2d 945 (1935) (illegal practice of optometry).

9. State v. Vaughn, 81 Ark. 117, 98 S.W. 685 (1902); People v. Condon, 102 Ill.App. 449 (1902); State v. O'Leary, 155 Ind. 526, 58 N.E. 703 (1900).

10. Stead v. Fortner, *supra* note 8; State v. Ellis, 201 Ala. 295, 78 So. 71 (1918).

11. *Ibid.*

12. For a New York application of this doctrine, see *People ex rel. Bennett v. Laman, supra* note 4.

In an effort to show that the remedy at law was not adequate the court discussed the scope of the defendants' business and their policy of resisting enforcement of the Pharmacy Law at every opportunity. It stated that this intent was manifested by the defendants having advised their customers to continue to display and sell the medicines involved in spite of orders to the contrary by the inspectors of the state Board of Pharmacy, as well as having agreed to assume the expenses of litigation if any action were brought against their customers. This policy of continued and widespread resistance to enforcement was held to be sufficient evidence of the inadequacy of the remedy at law. The dissenting opinion did not criticize the majority's holding on this point but could have observed that the defendants' policy of resistance may merely have been an effort to obtain adjudication in the courts and did not evidence a wide-spread conspiracy rendering legal remedies inadequate. Upon examination of the portions of defendants' testimony quoted in the majority opinion, it appears that they believed that they could legally sell these items and they intended to do so until the statute was interpreted. Instead, the dissent concluded that there had been no showing of inadequacy of the legal remedy because there had been neither prior convictions nor commencement of legal action. It would seem that a showing of either of the above factors would be evidence of the inadequacy of the legal remedy, but it hardly seems that their absence would be conclusive on the issue.

The trial court excluded the state's evidence as to the sale by self-service of the drugs in the supermarkets on the ground that the manner of sale had no bearing on the question of injury to public health. The Supreme Court held this to have been an undue restriction of the proof. The regulations of the state Board of Pharmacy[13] prohibited the granting of pharmacy licenses to supermarket-type stores where drugs were sold in an area not under the supervision of a pharmacist or where the purchaser was permitted to serve himself. This was evidence of the public policy of the state against such sale techniques. Furthermore, examination of the cautions and warnings of side effects printed on the labels of the medicines led the court to believe that the self-service sale of these items is dangerous to public health. Finally, the court said that even conceding that this specific indication of actual harm was not valid, the public policy of the state being that the uncontrolled sale of drugs and medicines is inimical to public health, a prima facie case had been made out. Since the defendants had offered no evidence, the trial court had erred in determining that there had been no showing of danger to the public health.

The opinion of the majority, basing the issue of danger to public health on self-service alone as it does, would seem to place the holding on weak grounds. The dissenting opinion attacked this reasoning very effectively when it pointed

13. Regulations 15, 18, and 19 of the State Board of Pharmacy are discussed at length by the majority in the instant case.

out that these same items could be purchased in a drug store by the same methods and that even in drugstores that do not employ the self-service method, the person that dispenses the merchandise is often an inexperienced clerk. This conflict is due to defective pharmacy laws that do not clearly define what may or may not be sold outside a drug store.[14]

In the present case, the majority failed to consider the effect on the purchaser when he buys patent medicines in a supermarket. The mere presence of the pharmacist in the drugstore promotes the confidence of the purchaser in the products which he selects. The public knows of the pharmacist's training and experience and may feel assured that the product he is buying is reliable. Furthermore, the purchaser may question and procure advice from a pharmacist which he cannot get from a super-market cashier. Had the court considered these factors and avoided the issue of self-service per se, it would have been able to reach the same result while effectively drawing a *material* distinction between super-market and drugstore sales.

Gary Sunshine

Forum Non Conveniens Applied to Suit Under FELA

"Generally speaking, forum non conveniens deals with the discretionary power of the court to decline to exercise a possessed jurisdiction whenever, because of varying factors, it appears that the controversy may be more suitably or conveniently tried elsewhere." Having thus defined forum non conveniens, the Supreme Court of the State of Illinois in *Cotton v. Louisville & Nashville R. Co.*[1] settled that State's judicial position by accepting the doctrine, and went on to review its application to suits maintained under the Federal Employer's Liability Act. The plaintiff, a Kentucky resident who had been injured in the defendant's

14. In New York, there is a bill presently before the legislature (N.Y. State Pharmacist, Jan., 1959, p. 11; Drug Topics, Feb. 2, 1959, p. 3), which would clarify this area, making it a misdemeanor for a manufacturer, wholesaler, or jobber to sell medicine to non-drug outlets. It also would prohibit self-service display of these items by restricting the sale to pharmacists and imposing on them the duty of acquainting the customer with the potentially toxic or habit-forming properties of the drug. The benefits of this bill seem obvious and it prompted the New York Times to write in an editorial on Monday. January 26, 1959:

> In a time when some drug stores have been turned into glorified five-and-tens, when patent medicines are peddled on TV and dispensed in the supermarkets it is a good thing to work toward the restoration of safety and sanity in the sale and purchase of remedies. This bill is designed, primarily, to protect the public. It hopes to cut down "blind" buying. But in so doing it can also protect the pharmacist and give him a new dignity and responsibility.

1. 14 Ill.2d 144, 152 N.E.2d 385 (1958).