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CONSTITUTIONAL LAW - LABOR UNIONS - INJUNCTION

E. N. D.
University of Michigan Law School

RECENT DECISIONS

This section is divided into two parts: notes and abstracts. The abstracts consist merely of summaries of the facts and holdings of recent cases and are distinguished from the notes by the absence of discussion.

NOTES

CONSTITUTIONAL LAW — LABOR UNIONS — INJUNCTION — Complainants owned and operated a small cafeteria conducting the business without the aid of any employees. Defendants, a labor union and its president, picketed the cafeteria in an attempt "to organize it." The picketing was carried on by parade of one person at a time in front of the premises, at all times in an "orderly and peaceful" manner. Signs were carried which tended to give the impression that the complainants were "unfair" to organized labor and that the pickets "had been previously employed in the cafeteria." These representations were knowingly false in that there had been no employees in the cafeteria and the complainants were "not unfair to organized labor." It further appeared as a fact that the pickets told prospective customers that the cafeteria served bad food and that by "patronizing" it "they were aiding the cause of Fascism." The complainants sought an injunction against such picketing and the state courts, from the trial court through to the court of last resort, enjoined the defendants. On certiorari the case was brought to the Supreme Court of the United States to determine whether the state court had "exceeded the bounds within which the Fourteenth Amendment confines state power." *Held,* the injunction should be dissolved. *Cafeteria Employees Union, Local 302, et al v. Angelos et al,* (Nov., 1943) 64 S. Ct. 126.

The conclusion seems to have been based upon the ground that the action of the state court amounted to a denial of free speech guaranteed, so far as state action is concerned, by the Fourteenth Amendment. This must be the law, for the highest court in the land without dissent says that it is. However, if that be true, then the law is even worse than what Bumble said it was.

FRAUDULENT CONVEYANCES — UNIFORM ACT — TEST OF "FAIR CONSIDERATION" —Writ of entry. Plaintiff claimed under an execution sale, defendant under a deed from the judgment debtor. Plaintiff charged that defendant's deed was void by virtue of the provision of the Uniform Fraudulent Conveyance Act dealing with transfers by an insolvent debtor "without a fair consideration." [1] The debtor had been a tenant in common of the premises with

[1] Mass. Gen. Laws (1932), c. 109A, § 4, also found in Laws Ann. (Michie, 1932), c. 109A, § 4, provides in part:

"Every conveyance made . . . by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made . . . without fair consideration."

Sec. 3 provides:

"Fair consideration is given for property or obligation—(a) When in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property

his brother and the defendant, his mother. In satisfaction of an indebtedness of $3,000 he conveyed to defendant his undivided interest of the agreed value of $4,000. The trial court found that the conveyance was made in good faith "for a fair consideration which was an antecedent debt not disproportionately small as compared with the value of the property obtained by her." *Affirmed.* The trial court erred in applying the definition of "fair consideration" in the second clause of section 3 of the Uniform Act relating to security transactions instead of the definition in the first clause dealing with exchange transactions, but the evidence supported the finding of good faith and of fair consideration. *Bianco v. Lay*, (Mass. 1943) 48 N.E. (2d) 36.

It was sensible to ignore the trial court's error in substituting the 3b formula, "not disproportionately small" for the 3a formula, "fair equivalent." These phrases are both so vague (because of the nature of these problems they are necessarily so vague) that there is no demonstrable difference between them. This is not to say that the same standard of judgment is to be employed in both cases, but the distinction arises not from differing phraseology of the two sections of the statute but from factual differences between the two types of transfer.

On the one hand, security transactions ought to involve and normally do involve an excess of property over debt, called "margin of security." The desirable percentage of margin will vary with the nature of the property (fluctuating or non-fluctuating, liquid or non-liquid, etc.) but under no conditions can a security be thought good unless the value of the property exceeds the debt by a fair margin. These practices and these attitudes are bottomed on the fact that excess value in the security transaction is not value placed beyond the reach of the debtor. He may recapture the excess by redemption or in other ways. Neither is the excess value placed beyond the reach of the debtor's creditors, who by process of some kind can reach his "equity" in the property without the aid of fraud law. It follows that there is no occasion to think of a security transaction as fraudulent unless and until the excess of security becomes so great that it cannot be justified even from the point of view of the secured creditor.[2]

Conditions are quite different in the case of the exchange transactions which are the subject of section 3a. Here, by hypothesis, the transferror keeps no strings on his property by way of a right of redemption. If, then, his property is worth more than the consideration he receives, he says good-bye to this excess of value forthwith, and if this excess is as great as the margin which is normal to a security transaction, the deal is necessarily a hard bargain for the transferror. Furthermore, if this hard bargain stands (if it is not impeached for fraud) the excess value is put entirely beyond the reach of creditors. It is not, as in the case of the security transaction, an "equity" remaining in the debtor and hence remaining within the reach of his creditors.

is conveyed or an antecedent debt is satisfied, or (b) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained."

[2] We are here concerned with constructive fraud spelled out of inadequate consideration. There are, of course, frauds of other kinds, e.g. fictitious securities for fictitious debts.

It follows that in the gamut of cases with which the Uniform Act is concerned the threshold of fraud is reached much sooner in exchange transactions than it is in security transactions. The single phrase "fair consideration" can be applied to both situations, but it must be applied with a difference. Presumably the draftsmen of the act meant to indicate this difference in the phrases employed in section 3 to define "fair consideration," viz. for exchange transactions the phrase "fair equivalent" and for security transactions the phrase "not disproportionately small." But the draftsmen faced this difficulty, that in each category there is a potpourri of cases varying in kind as well as in degree. For instance, in security transactions reasonable margin depends upon many factors, including the stability of the property (values fluctuating much or little) and its liquidity (market more or less organized, more or less active) and including also the personal responsibility of the debtor. Therefore to fix the meaning of "fair consideration" by a mathematical ratio of dollar values (whether 2:1 or 3:1 or whatever) would be intolerable. Likewise in the case of exchange transactions, the fairness of a bargain depends upon other factors than mathematical ratio of values. For instance, though it may be supposed that few would quarrel with the decision in the principal case, holding satisfaction of a debt of $3,000 to be fair consideration for an undivided interest in land of the "agreed value" of $4,000, reaction would have been quite different if the property had been highly liquid—for example, if it had been General Motors common stock having on the market of the day a value of $4,000. Again, consider the case of payment of a debt in cash. Such a payment is a "conveyance" within the meaning of the Uniform Act (see definition in section 1) and it is governed by the same definition of fair consideration that governed the principal case. That is to say, the same verbal formula, "fair equivalent" is applicable. But it is difficult to imagine the Massachusetts court holding payment of $4,000 cash in satisfaction of a $3,000 debt to be a conveyance for fair consideration.[3]

The upshot is that when the draftsmen of the Uniform Act split the cases into two groups, security transactions and exchange transactions, they hardly advanced at all toward a mathematical formula of fair consideration. They were still forced to use terms so vague that (we repeat) there is no demonstrable difference between them. It may be granted that the phrase "fair equivalent" connotes a closer approach to mathematical equality than does the phrase "not disproportionately small," but the difference is like that between strong and weak adjectives. It is too vague to affect the decision of cases.[4] So

[3] In the principal cases the court was not content to think of the problem in terms of a debt of $3,000 and property worth $4,000, but at p. 41 gave thought to the character of the property:

". . . we think that the judge . . . could properly take cognizance of the limited market for such undivided interests in land, the rights of cotenants to convey their particular interests to another or others and to force sales or divisions in partition proceedings, and the consequent possibility of not realizing the values placed upon them by the owners."

[4] Buhl v. McDowell, 51 S.D. 603 at 606, 216 N.W. 346 (1927) dealing with an exchange transfer: ". . . a fair consideration means one not disproportionate to the value of the property conveyed. In other words, it must be a fairly adequate consideration." In a similar case, Detroit and Security Trust Co. v. Gitre, 254 Mich. 66,

it is clear that if the Massachusetts court had reversed this decision because the wrong formula had been applied it would have been a miscarriage of justice. And, contemplating the vicissitudes of this case both in the trial court and in the appellate court, one cannot but question the wisdom of attempting, in the Uniform Act, to formulate a distinction betweeen the two types of conveyance. Might it not have been better to avoid all semblance of exactness by lumping conveyances of every kind in one bracket and applying to them something like the pharmacist's elastic phrase, *quantum sufficit?*

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235 N.W. 884 (1931), (conveyances to wife and son for services performed) the Michigan court employed the "disproportionately small" test. The latter case is frowned upon by Professor McLaughlin who apparently sees a significant difference between the two phrases; McLaughlin, "The Uniform Fraudulent Conveyance Act," 46 HARV. L. REV. 404 at 411 (1933). While not in sympathy with him on this point, we concur in his condemnation of cases which substitute "valuable consideration" for the statutory language. "Valuable consideration" is a technical term in contract law and notoriously includes the peppercorn.