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NOTE

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW.—In a recent case, *Wilson v. City of Zanesville,*[1] the majority of the Ohio Supreme Court decided that the action of the city of Zanesville in regulating the hours which barber shops might remain open for business was a reasonable and valid use of the police power of that municipality. The ordinance required that all barber shops be closed at 6:00 o'clock, P. M., on all days except Thursday and Saturday and the work day preceding certain named holidays. The plaintiff in error, Wesley Wilson, was charged in the municipal court of the city of Zanesville, Ohio, with

[1] 199 N. E. 187 (Ohio, 1935).

keeping his barber shop open after 6:00 P. M. on October 19, 1934, in violation of the city ordinance. After the Ohio Court of Appeals reversed the judgment of the lower court and remanded the cause with directions to overrule the demurrer that had been filed, Wilson presented a petition in error as of right in the Supreme Court, and the cause was then submitted on its merits.

The first question connoted by the facts in this case is that of the degree of police power inherent in a lawfully constituted municipal government, and the limits to the application of that power. Police power in a municipality finds its source in the state government, such power being delegated by the state to that subdivision of government. It does not have to be expressly delegated [2] for the reason that the police power is considered to be an essential adjunct to orderly government, an attribute corresponding to the right of self-preservation in an individual. The fact that there are conflicting regulatory requirements in various cities, towns, and districts contained within the boundaries of a state is the *raison d'etre* of local police power as part of the necessary authority of a municipality.[3]

Although the reason for the presence of police power in a municipal corporation is apparent, the question arises as to the limitations on the exercise of that power, that is, limitations other than those expressly prescribed by the state constitution. The limits of the police power are shadowy and incapable of exact determination. The courts have deemed it advisable to refrain from an exact definition of the extent of the power, preferring to make the power co-extensive with the need as expressed in the cases arising before them.[4] For the purposes of this Note, however, an attempt will be made to set down the general rules governing the exercise of police power by municipal corporations under three particular conditions: (1) When the state has acted and passed laws relative to the subject regulated, such laws being in existence; (2) When the state passes regulatory acts subsequent to the enactment of kindred regulatory ordinances by the various municipalities; and (3) When the state has not acted or regulated the subject matter.

When the state has acted and passed laws relative to the subject matter regulated, such laws being in existence. As a general proposition it can be said that a municipality may regulate matters of local concern although the same may be a proper subject of state regulation and may continue to do so until the state has spoken in regard thereto, in much the same manner as a state may pass bankruptcy laws

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2 Borough of Sayre v. Phillips, 148 Pa. St. 482, 24 Atl. 76, 33 Am. St. Rep. 842, 16 L. R. A. 49 (1892).

3 State v. Loden, 117 Md. 373, 40 L. R. A. (N. S.) 193, Ann. Cas. 1913E, 1300 (1912).

4 Stone v. Mississippi, 101 U. S. 814 (1880).

when they are not in conflict with federal bankruptcy legislation.[5] The state legislative act providing for the incorporation of a municipality is universally held to be a grant of power, and an interpretation of the charter adopted in pursuance thereof is the guide for determining the extent of the power conferred. The status of a municipal corporation as a creature of the state and having only such powers as are given by that sovereignty indicates clearly that any municipal regulation or ordinance which directly or indirectly contravenes the general law or policy of the state is *ultra vires* and, therefore, is void.[6] Assuming that there is concurrent jurisdiction over the subject matter, any conflict resulting from an ordinance passed subsequent to state action must be resolved in favor of the state regulation.

When the state passes regulatory acts subsequent to the enactment of kindred regulatory ordinances by municipalities. Generally speaking, a municipality cannot arrogate to itself police power over matters other than those requiring purely local regulation.[7] A state law enacted after municipal ordinances regulating the subject matter locally will not thereby automatically void the ordinance if its application is confined within local bounds. Excluding the so-called "Home rule" cities and towns, it would appear that in event the state legislature has undertaken to occupy a given field of legislation to the exclusion of municipal corporations, any ordinance in force at the time would be subordinated to the state action.[8] However, there may be room for the exercise of concurrent jurisdiction, and as long as the requirements of the municipal ordinance are not in themselves unreasonable or discriminatory it will be allowed to stand.[9] A city ordinance imposing limitations on the manner in which prescriptions for intoxicating liquor may be filled, more stringent than a subsequently enacted state law, not being unreasonable or discriminatory, was held to be a valid exercise of the municipal police power. The general test in such a case is whether or not the state statute could be reasonably interpreted as not excluding added municipal regulation.[10]

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[5] Consumer's Coal Co. v. City of Lincoln, 109 Neb. 51, 189 N. W. 643 (1922); City of Spokane v. Spokane and I. E. R. Co., 75 Wash. 651, 135 Pac. 636 (1913); Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940 (1904).

[6] Heartt v. Downers Grove, 278 Ill. 92, 115 N. E. 869 (1917); Randolph v. Gee, 199 Iowa 181, 201 N. W. 567 (1925); People v. Prism, 190 N. Y. 315, 83 N. E. 44 (1907); Baraboo v. Dwyer, 166 Wis. 372, 165 N. W. 297 (1917); East Cleveland v. City School Dist. Board of Education, 112 Ohio St. 607, 148 N. E. 350 (1925).

[7] Bluefield Water Works Co. v. Bluefield, 69 W. Va. 1, 70 S. E. 772, 33 L. R. A. (N. S.) 759 (1911).

[8] Pery v. Pulaski County, 103 Ark. 601, 148 S. W. 491 (1912).

[9] Ex Parte Iverson, 250 Pac. 681 (Cal. 1926); In re Hoffman, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75 (1909).

[10] Ex Parte Iverson, *op. cit. supra* note 9.

When the state has not acted or attempted to regulate the subject matter. Whenever the peace, security, health, morals and general welfare of a community demand governmental regulation, it is within the valid scope of municipal police power to provide that local regulation, in the absence of constitutional restrictions forbidding the exercise of the power. The obvious justification for this rule has been stated previously.

The principal question presented to the Ohio court in the instant case concerned the right of a municipality to regulate hours of labor as to legal and useful businesses. The specific question was whether a city council can impose upon the owners or employees of barber shops certain hours of a day which they can employ in the conduct of such business. A somewhat analogous situation is presented by the "Sunday closing" statutes. The majority of the cases hold that a special law prohibiting barbering on Sunday is a legitimate exercise of the police power of the states.[11] Ohio has passed on such a statute in the case of *Stanfeal v. State* [12] and upheld its constitutional validity on the grounds of general welfare. The minority view is represented by California,[13] Indiana,[14] Illinois,[15] and Missouri,[16] these courts basing their decisions on the ground that barbering is a quiet and orderly business, and to interfere with it is to deprive the owner of property without due process of law, and to negative the right of personal liberty guaranteed by state and federal constitution to choose and carry on a lawful business.

But does the fact that a state can lawfully prohibit business operations on the Sabbath establish the proposition that it has like authority to regulate hours in the business of barbering? In every case, interference by the state or the municipality can be justified on one ground only, namely, that such regulation is a valid exercise of the police power. If the health, safety, morals or general welfare of the locality are not affected adversely by the business of barbering at any or all hours, then it is an elementary principle of law that the governmental agency may not interfere with private business. "The guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have

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11 McClelland v. City of Denver, 36 Colo. 486, 86 Pac. 126, 10 Ann. Cas 1014 (1906); People v. Havnor, 149 N. Y. 195, 31 L. R. A. 689, 52 Am. St. Rep 707 (1896), in which the court upheld the validity of a statute prohibiting barbering on Sunday, holding the same to be valid exercise of the police power involving no unreasonable interference with personal or property rights.

12 Stanfeal v. State, 78 Ohio St. 24, 84 N. E. 419, 14 Ann. Cas. 138 (1908)

13 Ex Parte Jentasch, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664 (1896).

14 Armstrong v. State, 170 Ind. 188, 84 N. E. 3, 15 L. R. A. (N. S.) 64€ (1907).

15 Bailey v. People, 190 Ill. 36, 60 N. E. 98, 54 L. R. A. 838, 83 Am. St. Rep. 116 (1901).

16 State v. Granneman, 132 Mo. 326, 33 S. W. 784 (1896).

a real and substantial relation to the object sought to be attained." [17] The right to do business has been conditioned, restricted or prohibited in many instances and has been sustained on the grounds of police power. In the famous case of *Mugler v. Kansas* [18] state regulation prohibiting entirely the manufacture of intoxicating liquor was held valid. Statutes prohibiting the auction sale of jewelry after certain hours at night has been held to be a reasonable exercise of the police power [19] as imperfect light might work a fraud on the purchaser, and for the added reason that a night display of valuable gems might attract thieves. The opposite conclusion was reached in a Michigan case,[20] while an ordinance prohibiting the sale by auction of any goods, wares, or merchandise was held to be void by a Wisconsin court as an unreasonable interference with the right to conduct a lawful business.[21] The United States Supreme Court has sustained the validity of statutes prohibiting the washing and ironing of clothes in public laundries between certain hours at night on the grounds that such work is insanitary and dangerous because of fire when done at night.[22] In *Yee Gee v. San Francisco* [23] such an ordinance was held to be an unreasonable interference with the liberty of a citizen in the prosecution of his occupation. Ordinance attempting to regulate closing hours in general retail stores have been held void uniformly.[24] An ordinance forbidding pawnbrokers, second-hand dealers and junk dealers to keep open for the transaction of business after 7:00 o'clock, P. M., was held valid, under the police power, in Kentucky,[25], Georgia,[26] and Montana,[27] principally upon the grounds that places of that type are disposal points for stolen goods and that if the thief were obliged to transfer them in daylight his apprehension would be made less difficult. Ordinances requiring pool or billiard halls to be closed at certain hours at night have been held to be within the police power of a city to maintain peace and

17 Nebbia v. New York, 291 U. S. 502, 525 (1934).

18 123 U. S. 623 (1887).

19 Davidson v. Phelps, 214 Ala. 236, 107 So. 86 (1926); Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625, 39 A. L. R. 766 (1925); Roanoke v. Fisher, 137 Va. 75, 119 S. E. 259 (1923).

20 People v. Gibbs, 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, 830 (1915).

21 Hayes v. Appleton, 24 Wis. 542 (1869).

22 Barbier v. Connolly, 113 U. S. 27 (1885); Soon Hing v. Crowley, 113 U. S. 703 (1885).

23 235 Fed. 757 (N. D. Cal. 1916).

24 Ex parte Harrell, 76 Fla. 4, L. R. A. 1918F, 514 (1918); Saville v. Corless, 46 Utah 495, 151 Pac. 51, L. R. A. 1916A, 651, Ann. Cas. 1918D, 198 (1915).

25 Hyman v. Boldrick, 153 Ky. 77, 159 S. W. 369, 44 L. R. A. (N. S.) 1039 (1913).

26 Shurman v. City of Atlanta, 148 Ga. 1, 95 S. E. 698 (1918).

27 City of Butte v. Paltrovich, 30 Mont. 18, 75 Pac. 521, 104 Am. St. Rep. 698 (1904).

good order,[28] along with a statute prohibiting bowling alleys from remaining open after certain hours at night.[29] An Oregon case [30] supports the proposition that the closing of "soft drink" parlors at midnight by municipal ordinance is a valid exercise of the police power, the reason for the decision being found in the diverse definitions of what constitutes a "soft drink." The closing of a restaurant as per ordinance has been held valid;[31] but an ordinance prohibiting the operation of a skating rink after ten o'clock has been held to be an unreasonable exercise of a municipality's police power.[32]

The various cases noted illustrate strikingly both the elasticity of the police power possessed by state and municipal governments and the boundaries of the concept of general welfare, the sole justification for the exercise of police power. It is not surprising then to find a wide split of authority on the validity of ordinances regulating closing hours of barber shops. "The majority of the cases which have considered the validity of ordinances containing provisions regulating the closing hours of barber shops have reached the conclusion that such provisions are an unconstitutional invasion of the right to earn a living, and consequently a denial of due process, having no reasonable relation to the admittedly proper exercise of the police power in regulating the profession of barbering." [33] The following states ascribe to the majority rule: Georgia,[34] Louisiana,[35] Mississippi,[36] Washington,[37] Wyoming,[38] California,[39] Minnesota.[40] The federal courts in one decision have also followed the prevailing state rule.[41] It seems that only one state other than Ohio has held such a statute valid, namely, New Jersey.[42]

The Ohio court, in the majority opinion in the principal case, justifies the exercise of police power in this instance by the City of Zanesville, with three principal reasons: (1) That one who has toiled all day is not physically able to apply the means of sanitation, and to

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28 Tarsio v. Cook, 120 Mo. 1, 25 S. W. 202 (1894); Ex Parte Brewer, 68 Tex. Crim. Rep. 387, 152 S. W. 1068 (1913).

29 Commonwealth v. Colton, 8 Gray 488 (1857).

30 Churchill v. Albany, 65 Ore. 442, 133 Pac. 632, Ann. Cas. 1915A, 1094 (1913).

31 State v. Freeman, 38 N. H. 426 (1859).

32 Johnson v. Philadelphia, 94 Miss. 34, 47 So. 526, 19 L. R. A. (N. S.) 637 (1908).

33 Annotation, 98 A. L. R. 1089, 1094.

34 Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559, 55 A. L. R. 230 (1927).

35 Alexandria v. Hall, 171 La. 595, 131 So. 722 (1930).

36 Knight v. Johns, 161 Miss. 519, 137 So. 539 (1931).

37 Patton v. City of Bellingham, 38 Pac. (2d) 364 (Cal. 1934).

38 State v. City of Laramie, 40 Wyo. 74, 275 Pac. 106 (1929).

39 Ganley v. Claeys, 40 Pac. (2d) 817 (Cal. 1935).

40 State v. Johannes, 259 N. W. 537 (Minn. 1935).

41 McDermott v. City of Seattle, 4 F. Supp. 855 (D. C., W. D. Wash. 1933).

42 Falco. v. Atlantic City, 99 N. J. L. 19, 122 Atl. 610 (1933).