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MUNICIPAL CORPORATIONS — POLICE POWER — VALIDITY OF ORDINANCE FIXING CLOSING HOURS — A municipal ordinance required that all local business concerns selling or distributing food stay open for business only during the hours of duty of the municipal meat and food inspector. Hotels, restaurants, boarding houses, confectioneries, drug stores, soda fountains, and milk and cream dispensers were expressly excepted from these requirements. Plaintiff, a general grocery store, sought an injunction against the enforcement of these provisions, alleging that they were unreasonable and that the exceptions were discriminatory. *Held*, that under its police power to protect the public health, the municipality was authorized to pass such an ordinance as an aid to the proper inspection of foods. The exceptions were not discriminatory as class legislation, but were based upon a proper classification and upon considerations of necessity for accommodation and convenience. *Justensen's Food Stores, Inc. v. City of Tulare*, (Cal. App. 1937) 70 P. (2d) 529.

There is little doubt but that a city may make and enforce within its

limits such restrictions upon lawful businesses as are designed to protect the health, safety, morals, or general welfare of its citizens, provided such ordinances are not in conflict with the federal Constitution, state constitutional provisions, or general laws of the state, and provided that the city has statutory power, express or implied, to create such regulations.[1] Ordinances regulating closing hours of local businesses frequently depend for their validity upon the type of business sought to be regulated, and upon whether or not permitting such businesses to remain open after certain hours might adversely affect the public. Sunday closing hour ordinances, applied to businesses generally, have been upheld upon such vague principles as promotion of civil economy and general welfare.[2] On the other hand, ordinances broadly providing for week-day closing hours for general businesses are almost universally held to be invalid, either on constitutional grounds or as beyond the statutory power of the municipality in exercise of its police power.[3] But the hours of operation of so-called "questionable" or merely tolerated businesses, such as billiard parlors,[4] saloons,[5] and pawnshops, second-hand stores, and junkyards [6] may be controlled by ordinance on the assumption that such regulation promotes public morals and aids in preventing crime.[7] When an otherwise lawful or "useful" business has become a

[1] 3 MCQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 948 (1928); Armstrong v. Warden, 183 N. Y. 223, 76 N. E. 11 (1905); State v. Freeman, 38 N. H. 426 (1859). Several courts have held ordinances regulating closing hours of local businesses invalid as discriminatory or as an unreasonable exercise of statutory powers, while expressly refusing to pass upon the constitutional question whether the ordinance violates due process of law. Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559 (1927); State v. City of Laramie, 40 Wyo. 74, 275 P. 106 (1929).

[2] City of St. Louis v. Cafferata, 24 Mo. 94 (1856); Ex parte Sumida, 177 Cal. 388, 170 P. 823 (1918). But where the Sunday regulation applies to one class of business only, the question of discrimination and class legislation arises. McClelland v. City of Denver, 36 Colo. 486, 86 P. 126 (1906) (barber shops: ordinance upheld); Ex parte Jentzch, 112 Cal. 468, 44 P. 803 (1896) (statute applying to barber shops: held class legislation); Ex parte Koser, 60 Cal. 177 (1882) (statute closing saloons: upheld); Eden v. People, 161 Ill. 296, 43 N. E. 1108 (1896) (barber shops: statute held special legislation).

[3] "We cannot discover how an ordinance requiring every person conducting a legitimate mercantile business in a town, except a few specially favored classes, to close their places of business at six-thirty P.M. can in any manner, directly or remotely, even tend to promote public health, public morals, the public safety or the good order and peace of the community." Ex parte Harrell, 76 Fla. 4 at 5, 79 So. 166 (1918); State v. Ray, 131 N. C. 814, 42 S. E. 960 (1902); Saville v. Corless, 46 Utah 495, 151 P. 51 (1915) (statute applying to general businesses in cities of ten thousand population and over).

[4] Tarkio v. Cook, 120 Mo. 1, 25 S. W. 202 (1894); Ex parte Brewer, 68 Tex. Crim. Rep. 387, 152 S. W. 1068 (1913).

[5] State v. Calloway, 11 Idaho 719, 84 P. 27 (1906).

[6] Hyman v. Boldrick, 153 Ky. 77, 154 S. W. 369 (1913); Shurman v. City of Atlanta, 148 Ga. 1, 95 S. E. 698 (1918); City of Butte v. Paltrovich, 30 Mont. 18, 75 P. 521 (1904).

[7] In Ex parte Brewer, 68 Tex. Crim. Rep. 387 at 390, 152 S. W. 1068 (1913), the court declared that "during the hours between midnight and daylight were the hours in which the lawless element to a great extent would gather in and around saloons and breed crime. . . . Since the saloons have closed these elements have gathered

cover for deception or danger to public safety, closing hour regulations have been held valid.[8] The Supreme Court of the United States has upheld municipal closing hour regulations for laundries, as tending to promote public safety by minimizing the danger of fires.[9] Where a city attempts to fix closing hours for grocery stores, meat markets, or barber shops, the ordinance is often regarded as a regulation of the hours of labor for the benefit of employees, or as a provision to aid inspection and prevent the spread of disease.[10] A few courts have

around pool and billard halls . . . and the same reasoning, perhaps, which caused the legislature to close the saloons during those hours, would move the legislative bodies of the cities and towns to close the pool and billiard halls during the same hours."

"Thieves resort to second-hand stores, especially at night, to dispose of stolen goods, and, as they do this under cover of darkness, it is almost impossible to apprehend them. . . . To require the traffic in these goods to be carried on in the daytime and not at night is a reasonable regulation in the exercise of the police power." Hyman v. Boldrick, 153 Ky. 77 at 78, 80, 154 S. W. 369 (1913).

But an ordinance designed to prohibit a skating rink from doing business during certain hours was held void in Johnson v. Philadelphia, 94 Miss. 34, 47 So. 526 (1908).

[8] This has been particularly true in the case of auction sales of jewelry and similar articles. In Davidson v. Phelps, 214 Ala. 236, 107 So. 86 (1926), the court took judicial notice that the genuineness of jewelry sold at auctions is more readily determined in the daytime than by artificial light, and that the sale of jewelry at night affords opportunities for fraud upon the buyers. To the same effect are Roanoke v. Fisher, 137 Va. 75, 119 S. E. 259 (1923), and Clein v. City of Atlanta, 164 Ga. 529, 139 S. E. 46 (1927).

In Biddles v. Enright, 239 N. Y. 354 at 364, 146 N. E. 625 (1925), the court makes an interesting argument. "To say that there is not more danger at night from the assembling of such crowds around the place where valuables are publicly distributed than there would be in the daytime is to ignore the fact that darkness has always been sought as a cover for crime. . . . The electric light and the lamp post have had a great civilizing effect in all great cities, and by their shining have been silent missionaries of morality; but they have yet to make the streets of a great metropolis in all places as safe as they are in the daytime." But see Hayes v. Appleton, 24 Wis. 542 (1869), and People v. Gibbs, 186 Mich. 127, 152 N. W. 1053 (1915), where ordinances regulating hours of auctions were held invalid as too broad in scope.

An ordinance fixing closing hours for establishments dealing in soft drinks and bottled goods was sustained on the ground that "the council very likely believed that 'soft drinks' . . . were not as 'soft' as the unsophisticated may believe them to be." Churchill v. Albany, 65 Ore. 442, 133 P. 632 (1913). State v. Freeman, 38 N. H. 426 (1859), upheld an ordinance closing restaurants at ten o'clock P.M.

[9] Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357 (1885); Soon Hing v. Crowley, 113 U. S. 703, 5 S. Ct. 730 (1885), both cases involving ordinances closing laundries after certain hours at night in specified sections of San Francisco. Accord: Ex parte Wong Wing, 167 Cal. 109, 138 P. 695 (1914); Ex parte Moynier, 65 Cal. 33, 2 P. 728 (1884). But in Ye Gee v. San Francisco, (D. C. Cal. 1916) 235 F. 757, the court invalidated an ordinance providing closing hours for all laundries within the county limits and distinguished the Barbier and Soon Hing cases as applying to more limited territories where fire hazards were greater. The Maryland court held a Baltimore ordinance requiring laundries to close in the early hours of Monday morning void as having no relation to fire prevention, limitation of hours of labor, or abatement of noise. Spann v. Gaither, 152 Md. 1, 136 A. 41 (1927).

[10] *Food and meat sellers:* In re Gatsios, 95 Cal. App. 762, 273 P. 826 (1929);

recognized that neither of these considerations furnishes a proper basis for such an ordinance.[11] Most courts have failed to realize that the real purpose behind the majority of closing hour ordinances is not primarily to facilitate inspection, regulate hours of employees, nor any other of the reasons usually advanced, but is to force a small and recalcitrant minority of storekeepers to submit to the will of the majority engaged in the business to observe reasonable hours of closing, although this motive has been expressly or tactily recognized in a few opinions.[12] The confusion of opinion among the courts as to the

Brown v. Seattle, 150 Wash. 203, 272 P. 517 (1928) (denying any tendency of the ordinance to effectuate such ends).

Barber shops: After remarking that most late hour barbering is done by persons with another business by day, the court states in Wilson v. City of Zanesville, 130 Ohio St. 286 at 295, 199 N. E. 187 (1935): "It is apparent . . . that one who has toiled all day will not be fully capable of commanding the needed energy . . . to apply means of sanitation . . . which alone can ensure the health of the barber's patrons." As to labor regulations the court says (130 Ohio St. at 294): "fixing the hours the shop shall remain open may be to the legislative mind the only effective way to regulate hours of labor in this trade." The majority reject and the minority accept an ordinance regulating hours of barber shops in Patton v. City of Bellingham, 179 Wash. 566, 38 P. (2d) 364 (1934) on these grounds. Blake J., dissenting, remarks (179 Wash. at 583): "The chain shops by working two or three shifts, can keep open twelve, sixteen, or twenty-four hours. In order to live, the one or two chair shops must keep open for a like period. Thus through economic necessity, men in the latter shops are forced to work for a length of hours that deprives them of the leisure that makes life worth living." Pavlik v. Johannes, 194 Minn. 10, 259 N. W. 537 (1935), holds a barber shop closing hour ordinance invalid as having no relation to inspection or public health, or to hours of labor regulation.

[11] The fallacy of the argument that barber shops operating after the hours of duty of the inspector may endanger public health by spreading disease is pointed out in Ernesti v. Grand Island, 125 Neb. 688 at 691, 251 N. W. 899 (1933), the court remarking with caustic cajolery: "If germs develop overnight, by reason of origin later than seven o'clock in the evening, they may be more readily detected the next day. . . . Delay, overnight, on the part of the city to perform this function is not likely to be disastrous." To compel closing of shops between certain hours because it will be inconvenient for the city to then inspect them, when they are open at other hours ample for such inspection would unreasonably interfere with their operation. Knight v. Johns, 161 Miss. 519, 137 So. 509 (1931); State v. City of Laramie, 40 Wyo. 74, 275 P. 106 (1929). Such closing hour ordinances do not affect hours of labor of employees, but hours of business of shops and stores, and are thus not properly sustainable as laws regulating working hours of persons employed therein. Patton v. City of Bellingham, 179 Wash. 566, 38 P. (2d) 364 (1934).

[12] Alexandria v. Hall, 171 La. 595, 131 So. 722 (1930) (only twenty per cent of the city's barbers opposed the ordinance); Patton v. City of Bellingham, 179 Wash. 566, 38 P. (2d) 364 (1934) (ordinance invalidated on other grounds, but this factor was considered); Re McCoubrey and City of Toronto, 9 Dom. L. R. 84 (1913); Re Halladay and City of Ottawa, 15 Ont. L. R. 65 (1907).

The dissenting opinion of Blake, J., in Patton v. City of Bellingham, supra, points out that the real purpose of the laundry ordinances in Soon Hing v. Crowley, 113 U. S. 703, 5 S. Ct. 730 (1885), and Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357 (1885), was to curb Chinese competition in the laundry business, the areas affected by the closing hour provisions marking the boundaries of Chinatown.

validity of such ordinances is well illustrated by the fact that the Ohio Supreme Court has sustained an ordinance fixing business day closing hours for barber shops but has denied the power of a city to regulate closing periods for grocery stores,[13] whereas the California courts have invalidated barber shop closing hour provisions but have admitted municipal power to prescribe the hours of business of grocery and food sellers.[14] Barber shops have been a special target for municipal closing hour regulations. Where ordinances have attempted to fix the business day for such establishments, the courts of eight states have held such regulations to be an unreasonable interference with the conduct of a lawful business,[15] while the tribunals of two states and of Ontario have upheld the limitation as a proper exercise of municipal police power.[16] In a recent Ohio case, the majority of the court, in upholding an ordinance establishing closing hours for barber shops, advanced the novel argument that barber shops open for business in the evening tend to attract idlers and dissipaters and thus to endanger the public morals.[17] Where an ordinance establishes closing times for a class of businesses, and provides exceptions within the class to which the ordinance does not apply, such exceptions must be based upon reasonable dis-

[13] Wilson v. City of Zanesville, 130 Ohio St. 286, 199 N. E. 187 (1935) (barber shop); Olds v. Klotz, 131 Ohio St. 447 at 450-451, 3 N. E. (2d) 371 (1936) (grocery store), where Williams, J., who also wrote the prevailing opinion in the Wilson case, said: "The barber shop is a place where services rendered are of a personal nature. . . . They are not absolute essentials. On the contrary, places for distribution of foodstuffs are wholly necessary in order to furnish daily nourishment to the masses of our people."

[14] *Barber shop:* Ganley v. Claeys, 2 Cal. (2d) 266, 40 P. (2d) 817 (1935). *Grocery stores and meat markets:* In re Lowenthal, 92 Cal. App. 200, 267 P. 886 (1928); In re Gatsios, 95 Cal. App. 762, 273 P. 826 (1929); and the principal case.

[15] Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559 (1927); State v. City of Laramie, 40 Wyo. 74, 275 P. 106 (1929); Alexandria v. Hall, 171 La. 595, 131 So. 722 (1930); Knight v. Johns, 161 Miss. 519, 137 So. 509 (1931); Ernesti v. Grand Island, 125 Neb. 688, 251 N. W. 899 (1933); Patton v. City of Bellingham, 179 Wash. 566, 38 P. (2d) 364 (1934); Ganley v. Claeys, 2 Cal. (2d) 266, 40 P. (2d) 817 (1935); Pavlik v. Johannes, 194 Minn. 10, 259 N. W. 537 (1935). The Federal District Court for the Western Division of Washington has held the same way in McDermott v. Seattle, 4 F. Supp. 855 (1933).

[16] Wilson v. City of Zanesville, 130 Ohio St. 286, 199 N. E. 187 (1935); Falco v. Atlantic City, 99 N. J. L. 19, 122 A. 610 (1923) (under statute giving cities express power to regulate hours of barber shops); Re McCoubrey and City of Toronto, 9 Dom. L. R. 84 (1913) (under enabling statute).

[17] "Barber shops . . . may become lounging places for the idle and dissipated, and so a menace to minors, and often in our cities the barber shop in front may be a blind for a den of thieves, professional gamblers, gangsters, and racketeers behind. . . . If barber shops may run at all times of the night the number of vicious places of this character will inevitably be augmented." Wilson v. City of Zanesville, 130 Ohio St. 286 at 295-296, 199 N. E. 187 (1935).

The court in McDermott v. Seattle, (D. C. Wash. 1933) 4 F. Supp. 855, granted the plaintiff an injunction against enforcement of a similar ordinance on the equally unusual ground that it destroyed the good will which he had built up through an "open hours" shop and which had become a vested property right beyond the city's police power to change.

tinctions or the ordinance will be held invalid as discriminatory.[18] It is submitted that the desire of a preponderance of owners of a given class of business establishment in a city to keep reasonable closing hours without losing a chance to compete with a small minority of late hour operators in the business should be a valid reason for the existence of ordinances fixing closing hours for such establishments.[19]

[18] In re Gatsios, 95 Cal. App. 762, 273 P. 826 (1929); Chaires v. Atlanta, 164 Ga. 755, 139 S. E. 559 (1927); Hyman v. Boldrick, 153 Ky. 77, 154 S. W. 369 (1913); and the principal case.

In Ex parte Sumida, 177 Cal. 388 at 392, 170 P. 823 (1918), where a general Sunday closing ordinance excepted, inter alia, confectioneries and ice cream parlors, the court said, in sustaining the exception: "While the necessity for the keeping open of confectioneries and ice cream parlors may not be so great in cold climates, we cannot say that in the region of Fowler the daily demand for the articles sold at such places may not be so . . . great as to justify the discrimination."

[19] The Ontario Shops Regulation Act gives the council of a municipality the right to pass by-laws regulating closing hours of certain classes of businesses within the city, where written application is made by not less than three-fourths the number of occupiers of shops within the city belonging to the class to which the application relates. An ordinance establishing closing hours for barber shops was sustained under this act in Re McCoubrey and City of Toronto, 9 Dom. L. R. 84 (1913), and the act was strictly construed in Re Halladay and City of Ottawa, 15 Ont. L. R. 65 (1907), where an ordinance fixing closing periods for grocery stores under the act was involved.