Michigan Law Review

Volume 36 | Issue 8

1938

MUNICIPAL CORPORATIONS - POLICE POWER - REGULATION OF AUCTIONS

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MUNICIPAL CORPORATIONS — POLICE POWER — REGULATION OF AUCTIONS — A municipal ordinance provided that only licensed auctioneers or owners of the goods, after furnishing bond, could conduct auction sales in the city. It further required the seller to accept the best of two or more bids, required labeling of all articles to be sold, advance published notice of the auction, a display and opportunity for examination before the sale, and the confining of the sale to certain hours of the day. Plaintiff, a corporation occasionally selling furniture by auction at its permanent business location, objected to these restrictions as an arbitrary interference with its conduct of a lawful trade. Defendant city attempted to justify the ordinance under its police power to promote the public welfare. *Held*, the provisions of the ordinance place an unreasonable burden upon a legitimate and useful business, and are not within the city's statutory police powers. *Perry Trading Co. v. City of Tallahassee*, 128 Fla. 424, 174 So. 854 (1937).

Auctioneering has traditionally been considered as subject to stringent regulation by the state, being classified with the saloon, poolhall, pawnshop, and junkyard as a "dangerous," questionable, or merely tolerated business.[1] From

[1] ". . . the business of an auctioneer . . . has always been affected with a public interest and subject to legislative regulation," comparing the regulatory power of a city over pawnbrokers, second-hand dealers, and junk peddlers. Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625 (1925). "Selling at auction is essentially public in its character, and properly within the power of the state to regulate." Village of Port Jervis v. Close, 53 Hun. 634, 6 N. Y. S. 211 at 212 (1889); Sipe v. Murphy, 49 Ohio St. 536, 31 N. E. 884 (1892).

In City of Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361 (1884), the court compares the authority of the city to license and regulate theatrical performances, exhibitions, billiard tables, and tavern keepers with its power to supervise auctions and auctioneers. And People ex rel. Schwab v. Grant, 126 N. Y. 473 at 476, 27 N. E. 964 (1891), after remarking that "there has been no time in the history of the state

an early date state legislatures have regulated auctions and auctioneers by specific statutes or have delegated to municipalities the power to license, restrict, and tax them, and the New York legislation has made the licensed auctioneer an administrative officer of the state under its direct supervision.[2] The primary reason for this close legislative surveillance has been the feeling that auction sales furnish unusual opportunities for deception, imposition, and the perpetration of frauds upon the buyers.[3] This has been particularly true in the case of sales of jewelry, watches, and similar articles by auction, especially where such sales are conducted at night.[4] As a result, ordinances establishing daylight clos-

when it was lawful for citizens generally to pursue the occupation of auctioneers," places the authority to license and regulate auctioneers alongside the power to license "scavengers of night soil."

[2] The New York legislation with regard to the conduct of auctions and auctioneers presents an interesting history. The first regulatory law upon the subject was passed by the colonial assembly of the state in 1773, being entitled: "An act to prevent the sale of goods at night by vendue auction or outcry in the City of New York," and reciting that "a practice of selling goods by auction at night, when their qualities cannot be accurately distinguished, has obtained in the City of New York, whereby the unwary have been frequently imposed upon, and great frauds committed. . . ." This was followed by a series of enactments limiting the number of auctioneers to be licensed in each city and county of the state. An act of 1853, declaring in its preamble that "certain evil-disposed persons, especially in the City of New York, have . . . by means of certain fraudulent and deceitful practices known as 'mock auctions' most fraudulently obtained great sums of money from unwary persons," declares all auctioneers to be administrative officers of the state and requires them to be licensed and appointed by the governor. That auctioneers are still in a sense officers of the state in New York is held in People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964 (1891), which traces the history of auction regulation in the state.

A few later New York decisions have indicated a relaxation of the strict policy of supervision of the conduct of auctions. Robinson v. Wood, 119 Misc. 299, 196 N. Y. S. 209 (1922), invalidating an ordinance fixing closing hours for all auction sales; Moskowitz v. Jenkins, 202 N. Y. 53, 94 N. E. 1065 (1911). However, the reasoning of the Robinson case was expressly disapproved and overruled in Carlton v. City of Watertown, 124 Misc. 244, 207 N. Y. S. 339 (1924), which upheld an ordinance extending the rights of bidders at auctions; and Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625 (1925), and Alexander v. Enright, 211 App. Div. 146, 206 N. Y. S. 785 (1924), both of which upheld ordinances enacted under the "Sunset Law," limiting auction sales to daylight hours.

[3] ". . . such sales are frequently conducted by irresponsible parties, who have come into the city for temporary purposes only, who deceive the public by fraudulent sales, and then remove from the jurisdiction of the court or prove to be unreliable and insolvent, whereby the public are irreparably injured." City of Roanoke v. Fisher, 137 Va. 75 at 85, 119 S. E. 259 (1923). To the same effect are People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964 (1891); Carlton v. City of Watertown, 124 Misc. 244, 207 N. Y. S. 339 (1924); Mogul v. Gaither, 142 Md. 380, 121 A. 32 (1923); State v. Bates, 101 Minn. 301, 112 N. W. 67 (1907); and the dictum of Dornberg v. City of Spokane, 125 Wash. 72, 215 P. 518 (1923).

[4] ". . . to say that because the candle and the lamp-light have been succeeded by the electric light, deception and fraud cannot be perpetrated . . . may not be true to fact. . . . too much artificial light, or the nature of the artificial light may be as deceiving as the candle or the lamp. . . . Without any actual intent to defraud, purchasers

ing hours for auction sales of jewelry are generally sustained as being reasonably related to the promotion of financial safety and welfare.[5] But where the time limitation extends to all auction sales there is more doubt as to their validity.[6] A few courts have upheld closing hour limitations on auction sales upon the novel ground that the conducting of auctions at night encourages crime and endangers the lives and property of purchasers.[7] Where an ordinance attempted to restrict the situs of auction sales to designated parts of the city, the court held such restraint unreasonable as having no substantial relation to public welfare.[8] Provisions prohibiting the use of "cappers" or "puffers" in connection with the conduct of auction sales are almost uniformly sustained.[9] If so authorized by statute, a municipality may require auctioneers to obtain licenses and pay stipulated fees in order to conduct their sales.[10] But the license fee must not be so high

may be deceived as to the nature and quality of the article they are buying where there is no opportunity to examine it by daylight." Biddles v. Enright, 239 N. Y. 354 at 362, 146 N. E. 625 (1925); Levy v. Stone, 97 Fla. 458, 121 So. 565 (1929); Clein v. City of Atlanta, 159 Ga. 121, 124 S. E. 882 (1924).

[5] Levy v. Stone, 97 Fla. 458, 121 So. 565 (1929), holding that fraud and imposition on the public are more likely to occur in auction sales of jewelry when they are conducted by artificial light than in the case of other classes of goods sold at auction or in auctions conducted in the daytime; Adams v. Isler, 101 Fla. 457, 134 So. 535 (1931); Ex parte West, 75 Cal. App. 591, 243 P. 55 (1925); City of Buffalo v. Marion, 13 Misc. 639, 34 N. Y. S. 945 (1895). In Holsman v. Thomas, 112 Ohio St. 397, 147 N. E. 750 (1925), a provision that no jewelry could be sold at auction within the city for more than 60 days in any year was upheld. An Atlanta ordinance regulating the conduct of auction sales of jewelry alone was sustained as being based upon a reasonable classification. Clein v. City of Atlanta, 159 Ga. 121, 124 S. E. 882 (1924).

[6] Ordinances establishing hours of operation for all auction sales have been upheld in Alexander v. Enright, 211 App. Div. 146, 206 N. Y. S. 785 (1924), and in Biddles v. Enright, 239 N. Y. 354, 146 N. E. 625 (1925). Contra, as unreasonable interference with property rights: Hayes v. City of Appleton, 24 Wis. 542 (1869); People v. Gibbs, 186 Mich. 127, 152 N. W. 1053 (1915); Robinson v. Wood, 119 Misc. 299, 196 N. Y. S. 209 (1922).

[7] "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." Biddles v. Enright, 239 N. Y. 354 at 364, 146 N. E. 625 (1925). In the principal case, the court, considering the argument that the ordinance was designed to prevent the assembling of crowds, took judicial notice that large crowds assembled before a local theater for a "lucky draw" one night each week without incurring municipal disfavor.

[8] Dornberg v. City of Spokane, 125 Wash. 72, 215 P. 518 (1923). But an ordinance prohibiting public auction sales on streets, sidewalks, and public places within the city was sustained in White v. Kent, 11 Ohio St. 550 (1860).

[9] Clein v. City of Atlanta, 159 Ga. 121, 124 S. E. 882 (1924); Adams v. Isler, 101 Fla. 457, 134 So. 535 (1931).

[10] People ex rel. Schwab v. Grant, 126 N. Y. 473, 27 N. E. 964 (1891); State v. Bates, 101 Minn. 301, 112 N. W. 67 (1907), where the ordinance provided that no license could issue for auction sales of jewelry or watches; Village of Port Jervis v. Close, 53 Hun. 634, 6 N. Y. S. 211 (1889).

as to be unreasonable or have the effect of prohibiting the conduct of auctions.[11] Many ordinances have been directed primarily against the itinerant or transient auctioneer, and in some cases their obvious purpose has been to stifle business competition by non-residents with local established merchants. Where the license fee required from non-resident auctioneers is disproportionately high as compared with that required from residents desiring to conduct an auction, most courts hold the provision invalid as unfairly discriminatory.[12] Where an ordinance seeks to give the bidder an advantage over the auctioneer which he would not have had in the ordinary conduct of the auction sale, the courts divide as to its validity.[13] There is an increasing tendency to relax the traditional viewpoint toward auctions, and, as in the principal case, to view the business of the auctioneer as legitimate, proper, and useful.[14] It is submitted that whatever reasons may once have obtained for cataloguing the auctioneer with the public

[11] Dusenbury v. Chesney, 97 Fla. 468, 121 So. 567 (1929), where the license fee for conducting an auction was $250 per day and obviously intended to exclude transient auctioneers; Moskowitz v. Jenkins, 202 N. Y. 53, 94 N. E. 1065 (1911), where the exaction was $100 per month for transient auctioneers selling bankrupt or damaged stock at auction; City of Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361 (1884), license fee of $300 held unreasonable as a police regulation and unauthorized as a tax; Margolies v. Atlantic City, 67 N. J. L. 82, 50 A. 367 (1901), $2,500 fee held attempt to prohibit conduct of auctions; Caldwell v. City of Lincoln, 19 Neb. 569, 27 N. W. 647 (1886), provision for license fee of $12 per day not to be issued for less than ten days.

[12] Dusenbury v. Chesney, 97 Fla. 468, 121 So. 567 (1929), where transitory auctioneers were required to pay $250 per day, whereas established merchants, resident in the city for two years or more were charged only $200 for a thirty day license; Moskowitz v. Jenkins, 202 N. Y. 53 at 58, 94 N. E. 1065 (1911), the court [quoting People v. Gillson, 109 N. Y. 389 at 399 (1888)] remarking that: "It [the ordinance] is evidently of that kind . . . which is meant to protect some class in the community against the fair, free, and full competition of some other class, the members of the former class . . . flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors."

A Columbus ordinance prohibiting the importation of goods into the city for auction sale without procuring a license not required from sellers of goods brought into the city for other purposes was held invalid as a covert attempt to discriminate against itinerant auctioneers. Sipe v. Murphy, 49 Ohio St. 536, 31 N. E. 884 (1892). Accord: Where the ordinance required a license from temporary residents conducting auctions, thereby discriminating in favor of established merchants. City of Carrollton v. Bazzette, 159 Ill. 284, 43 N. E. 837 (1896); Miller v. City of Greenville, 134 S. C. 314, 132 S. E. 591 (1926).

[13] Carlton v. City of Watertown, 124 Misc. 244, 207 N. Y. S. 339 (1924), upheld an ordinance requiring auctioneers to allow the second highest bidder to purchase the goods in case the highest bidder, whose offer had been accepted, did not come forward at the close of the sale. In the principal case, however, a provision in the ordinance requiring acceptance of the highest of two or more bids was held invalid as invading the property rights of the auction seller.

[14] "The business of an auctioneer is regarded not only as a legitimate calling, but often as a useful and important line of vending in the sum total of business activities." People v. Gibbs, 186 Mich. 127 at 130, 152 N. W. 1053 (1915). Accord: Robinson v. Wood, 119 Misc. 299, 196 N. Y. S. 209 (1922).

scavenger and the saloon-keeper no longer exist, and that the court in the principal case has taken a realistic approach in recognizing auction sales as legitimate and respectable methods of conducting business.

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