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Municipal Corporations - Police Power - Sundy Closing Ordinances

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MUNICIPAL CORPORATIONS—POLICE POWER—SUNDAY CLOSING ORDINANCES —The City of Chattanooga passed an ordinance making in unlawful "for any person, firm, corporation, or association operating a general merchandise store, department store, hardware, jewelry, furniture, grocery store, super market, meat market, or other similar establishments in the City of Chattanooga, Tennessee, to open such place of business on Sunday; or to sell or offer for sale, give away, or deliver any merchandise, groceries, hardware, jewelry, furniture, meat, produce, or other similar commodities or articles, on Sunday." Plaintiffs brought this action for a declaratory judgment that the ordinance was unconstitutional and for other relief. In the lower court the Chancellor sustained the demurrer of defendants. On appeal, *held,* affirmed. The ordinance was a valid exercise of the police power and was not so unreasonable or arbitrary as to discriminate unconstitutionally between persons similarly situated. *Kirk v. Olgiati,* (Tenn. 1957) 308 S.W. (2d) 471.

Recent cases uniformly sustain, in principle, Sunday closing ordinances as a proper exercise of the police power, the reason being "that experience has demonstrated that one day's rest is requisite for the health of most

individuals, and not all individuals possess the power to observe a day of rest of their own volition."[1] The courts have recognized that Sunday closing ordinances directed toward observance of a Christian holiday would be invalid under the Fourteenth Amendment, but have sustained them on the secular ground that Sunday is traditionally a day of rest.[2] The choice of Sunday is discretionary with the legislature, and any other day would be as satisfactory.[3] Administrative difficulties in allowing alternate closing days would seem to militate against such a statute. Selection of Sunday consequently does not effect the establishment of a religion.[4] The real problem in connection with Sunday closing ordinances is the extent to which exceptions may be made without running into constitutional difficulties. Two general arguments may be made, one on due process grounds and the other based on equal protection. The due process question involves determination of whether the means selected to achieve the purpose of the ordinance are reasonable in view of the exceptions made to the prohibition of Sunday business. The exceptions referred to here are those the statute draws *between* classes, such as grocers and druggists. The Illinois court has taken the position "that if a general Sunday closing ordinance is to be valid . . . , the exceptions to its operation must

[1] Irishman's Lot v. Secretary of State, 338 Mich. 662 at 669, 62 N.W. (2d) 668 (1954), citing People v. Bellet, 99 Mich. 151 at 156, 57 N.W. 1094 (1894).

[2] Lane v. McFayden, 259 Ala. 205, 66 S. (2d) 83 (1953); State v. Ullner, (Ohio App. 1957) 143 N.E. (2d) 849; Commonwealth v. Grochowiak, 184 Pa. Super. 522, 136 A. (2d) 145 (1957); People v. Friedman, 302 N.Y. 75, 96 N.E. (2d) 184 (1950), app. dismissed 341 U.S. 907 (1951); Henderson v. Antonacci, (Fla. 1952) 62 S. (2d) 5. See also Gundaker Central Motors v. Gassert, 23 N.J. 71, 127 A. (2d) 566 (1956), app. dismissed 354 U.S. 933 (1957); Humphrey Chevrolet v. Evanston, 7 Ill. (2d) 402, 131 N.E. (2d) 70 (1956); Arrigo v. City of Lincoln, 154 Neb. 537, 48 N.W. (2d) 643 (1951).

[3] Lane v. McFayden, note 2 supra. People v. Friedman, note 2 supra, at 79, noted that while Sunday laws "may . . . have had a religious origin" it is now recognized "that the first day of the week by general consent is set apart 'for rest'" and such an ordinance is not a "law respecting an establishment of religion." Commonwealth v. Grochowiak, note 2 supra, at 147 said that "Blue laws . . . in general setting aside the first day of the week as a day of rest are civil legislation . . . although they defer to the religious concept of Sunday as a holy day."

[4] Nevertheless, a real argument exists that a Sunday closing ordinance forces a conscientious person whose holy day is other than Sunday either to cease business two days a week, thus diminishing his ability to earn a living, or else to work on his religious day in violation of his beliefs. See Allan, "The Fight for a Fair Sabbath Law," 72 NAT. JEW. MO., June 1958, p. 8. It could therefore be argued that such laws deny equal protection and interfere with religious liberty as well as effect the establishment of a Christian religious day. See generally, PFEFFER, CHURCH, STATE, AND FREEDOM 227-241 (1953). Such arguments were raised unsuccessfully, however, in People v. Friedman, note 2 supra, and the United States Supreme Court dismissed the appeal "for the want of a substantial federal question." It might be argued that to allow closing on an optional day would not solve the problem, for conscientious employees whose sabbath was other than the day chosen by the employer would also lose two working days. In that case, however, the problem involves only the individual and his choice of jobs, and not direct coercion by state instrumentalities.

bear some reasonable relation to the public health, safety, morals, or general welfare. . . ."[5] In New York the court of appeals has indicated the extent of legitimate exceptions by observing that exceptions for necessities, recreation and conveniences "merely emphasize that the Legislature recognizes Sunday as a day for rest, play, relaxation, and recreation. . . ."[6] The Virginia court has taken a broad view of necessity by remarking that "the work of necessity covered by the exception in the statute is not merely one of absolute or physical necessity, not merely something required to furnish physical existence or safety of person or property, but embraces as well all work reasonably essential to the economic, social, or moral welfare of the people, viewed in the light of the habits and customs of the age in which they live and of the community in which they reside."[7] Courts taking this approach have invalidated ordinances which laid down a blanket prohibition on Sunday business but exempted activities not within the scope of "necessity,"[8] and have also struck down an ordinance banning automobile sales on Sunday.[9] The contrary argument, sustaining all Sunday closing ordinances attacked on due process grounds, is that although "in the judgment of some [it] does not go far enough, and should include other avocations, or be general, [there] is no reason why it should not be upheld to the extent it does go, when, though limited in its application, it affects alike all persons following the particular avocation inhibited on Sunday."[10] The equal protection argument has reference to discrimination *within* a class, for discrimination between classes will not defeat an ordinance for equal protection purposes.[11] Thus a ban on Sunday auto sales alone might be effected.[12] If the court takes as its test a classification based on commodities, the ordinance is likely to be held invalid.[13] This would be true if a grocer and druggist both sold toothpaste and the statute allowed only a druggist to remain open on Sunday. On the other hand, if the classification test is limited to type of merchant the success of the ordinance is assured if it does not dis-

[5] City of Mount Vernon v. Julian, 369 Ill. 447, 17 N.E. (2d) 52 (1938).

[6] People v. Friedman, note 2 supra; State v. Haase, 97 Ohio App. 377, 116 N.E. (2d) 224 (1953), and Commonwealth v. Chernock, (Mass. 1957) 145 N.E. (2d) 920, sustained statutes that contained an exception for work of necessity or charity.

[7] Francisco v. Commonwealth, 180 Va. 371 at 379, 23 S.E. (2d) 234 (1942), cited with approval in Rich v. Commonwealth, 198 Va. 445 at 450, 94 S.E. (2d) 549 (1956).

[8] Henderson v. Antonacci, note 2 supra; City of Mount Vernon v. Julian, note 5 supra.

[9] McKaig v. Kansas City, 363 Mo. 1033, 256 S.W. (2d) 815 (1953).

[10] Frantz, J., concurring specially in Mosko v. Dunbar, (Colo. 1957) 309 P. (2d) 581 at 588. See also Gundaker Central Motors v. Gassert, note 2 supra; City of Elizabeth v. Windsor, 31 N.J. Super. 187, 106 A. (2d) 9 (1954).

[11] State v. Towery, 239 N.C. 274, 79 S.E. (2d) 513 (1954), app. dismissed 347 U.S. 925 (1954).

[12] Mosko v. Dunbar, note 10 supra; Gundaker Central Motors v. Gassert, note 2 supra.

[13] Arrigo v. City of Lincoln, note 2 supra. But see Taylor v. Pine Bluff, 226 Ark. 309, 289 S.W. (2d) 679 (1956), cert. den. 352 U.S. 894 (1956).

criminate within a class of merchants.[14] The Chattanooga ordinance here litigated was vulnerable in at least two respects. First, the list of businesses banned from Sunday operation was so incomplete that the ordinance was perhaps not a satisfactory way to achieve the purpose sought and thus was a due process violation. Second, a classification based on type of commodity would doubtless show discrimination between common products of grocers and druggists and therefore not satisfy the equal protection clause. In disregarding these two objections to the validity of the ordinance, the court reflected a recognizable tendency to give wide discretion to the legislature in the exercise of police power in this area. As in the principal case, Sunday closing ordinances are normally sustained.[15]

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[14] State v. Towery, note 11 supra. State v. McGee, 237 N.C. 633, 75 S.E. (2d) 783 (1953), app. dismissed 346 U.S. 802 (1953), reh. den. 346 U.S. 918 (1954), held that a movie house was in a class different from a radio station; therefore, an ordinance was valid which prohibited movies on certain hours on Sunday while imposing no limitation on operation of radio stations.

[15] A survey of 22 cases that have reached the appellate courts since 1950 found only three Sunday closing ordinances or statutes invalidated. Two of these were based on due process grounds and the third on equal protection.