Marquette Law Review

Volume 27
Issue 2 *February 1943*

Article 9

Municipal Corporations - Limitations on the Power to License

William Smith Malloy

case. The instant case then cites the *Biersach* case as ruling its decision; and the *Fraundorf* and *Lefebvre* cases fall directly in line with both the reasoning and the rule of the *Biersach* case. Thus it would seem that a definite and harmonious construction of the five-sixths jury verdict statute has been attained.

JOAN MOONAN.

Municipal Corporations—Limitations on the Power to License.—By an ordinance of the respondent city, transient photographers were forbidden to engage in the business of photography, or the sale of photographs, enlargements, or coupons without first obtaining a license from the city at a cost of ten dollars per business day. The defendant was arrested, tried in municipal court, and found guilty of violating the ordinance. On the trial, it appeared that the defendant was engaged in taking snapshots and forwarding the film to an out of state photography house which paid the defendant a flat fee for each sales prospect with an additional bonus if sales exceeded a given total. The defendant's average income was $11.33 per day, while the firm for which he worked derived a profit of between six and seven per cent. The circuit court on appeal affirmed the sentence of the municipal court, sustaining the city's contention that the ordinance was valid as a revenue measure. Defendant appealed to the Supreme Court on the ground that the ordinance was invalid as discriminatory and the fee was unreasonable and confiscatory. The Supreme Court reversed the conviction on the ground that the ordinance was invalid as amounting to the suppression of a lawful business and as an imposition which could not be sustained under the taxing power of the municipality. *City of Racine* v. *Wayhe,* 5 N.W. (2d) 747, Wis. 1942.

The power of a municipality to require a license of those engaged in a designated trade or profession within its boundaries and to demand a fee for such license is recognized generally to have two sources: the police power and the power to raise revenue. Since municipal corporations are totally the creatures of the state, neither power can be exercised unless authorized by the charter of the municipality or by a charter ordinance having the same effect. The granting of one power does not confer the other, and if either the power to tax or the power to regulate a vocation is given specifically, the courts will not infer the existence of the other. *City of Tucson* v. *Stewart,* 45 Ariz. 36, 40 P. (2d) 72, 1935; *City of Creston* v. *Mezvinsky,* 213 Ia. 212, 240 N.W. 676 (1932); *License Tax Cases,* 5 Wall. 471, 18 L.Ed. 497 (1867). Nevertheless, the state may grant to a municipal corporation both the power to regulate and to license for revenue, and an ordinance passed under such authorization will not be held invalid because justified by several provisions in a charter. *Gundling* v. *City of Chicago,* 176 Ill. 340, 52 N.E. 441 (1898); *City of Monroe* v. *Endelman,* 150 Wis. 621, 138 N.W. 70 (1912).

Where the business sought to be regulated bears no reasonable relation to the health, safety, or morals of the community ,ordinances imposing a license can not be justified as a valid exercise of the police power. *Fetter* v. *City of Richmond,* 142 S.W. (2d) 6 (Mo. 1940); *City of Creston* v. *Meszinsky, supra.*

Moreover, the same result will be reached if, though, as in the instant case, the business might be subject to reasonable regulation, the ordinance itself shows a contrary intention; for instance, by demanding as a condition of the license a fee so grossly in excess of the expense of issuing the license and enforcing the

regulation that the courts can say as a matter of law that there has been an invalid exercise of the police power. *Maryland Theatrical Corp.* v. *Brennan,* 24 A. (2d) 911 (Md. 1942).

When a muncipality lays a license upon a vocation for the purposes of raising revenue, as mentioned before, it must be able to justify its exaction by reference to a specific provision in its charter authorizing such method of raising revenue. The power is in its nature the power to impose an excise tax on the privilege of conducting business. Beyond the need of authorization, the only limitations upon the power of the municipality lie in the due process clause of the 14th amendment to the Federal Constitution and in kindred provisions of state constitutions. *C. B. and Q. R. R. Co.* v. *Chicago,* 166 U.S. 226, 41 L.Ed. 979, 17 S.Ct. 581, (1897).

The municipality need not restrict its taxes to those businesses which it could prohibit entirely. Impositions have been held legal when levied upon transactions or occupations which are matters of inherent and natural right as well as on those made possible by virtue of statutory authority. *Beals* v. *State,* 139 Wis. 544, 121 N.W. 347 (1909).

The requirements of due process are twofold. The first and lesser constitutional hurdle which an ordinance must pass is that a valid ground must exist for setting the business sought to be licensed apart from others not so taxed. In this respect the legislative body of the municipality has wide discretion, and in order that the ordinance be sustained it must only appear that the classification is not palpably arbitrary. *Singer Sewing Machine Company* v. *Bricknell,* 233 U.S. 304, 34 S.Ct. 493, 58 L.Ed. 974 (1913); followed in *Campbell Baking Co.* v. *City of Harrisonville, Mo.,* 50 F. (2d) 670 (C.C.A. 8th, 1931).

In the latter case, the Circuit Court of Appeals on a state of facts very similar to that of the principal case held that a substantial distinction did exist between transient and resident merchants, and that a license fee of two dollars a day, imposed for revenue purposes upon all merchants with a saving clause exempting those doing business at an established local place of business could not be challenged as discriminatory by a non-resident bakery company making deliveries in the city.

In addition, a revenue licensing measure must not demand a fee which is exorbitant. Under the power to tax, municipal corporations cannot prohibit an individual from engaging in a legitimate trade. What is reasonable as a fee varies in individual cases and only very general principles can be laid down. Courts have held that the city may take into consideration the population of the city, the profitableness of the business, the nature of the business and its effect upon the community, and the expenses incurred in supervising its enforcement. *Ex Parte Sikes,* 102 Ala. 173, 15 So. 522 (1894). The number of persons who have found it profitable to pay the charge and remain in business, and the amounts previously collected is also a valid consideration. *Maryland Theatrical Corp.* v. *Brennan, supra.*

Courts have held that a flat fee license amounting to four tenth of one per cent of gross sales is not unreasonable. *Giant Tiger Corp. of Camden* v. *Board of Commissioners of the City of Camden,* 122 N.J.L. 240, 4 A. (2d) 775 (1939). The same court held a licensing ordinance imposing a fee of three hundred dollars on each vehicle used by ice cream peddlers was void as excessive when such tax was shown to amount to thirty per cent of the annual gross income from the use of such vehicle. *Gurland* v. *Town of Kearny,* 128 N.J.L. 22, 24 A. (2d) 210 (1942). In Wisconsin license fees of twenty and twenty-five dollars a day have been disposed of as confiscatory, the former by the federal district

court without reference in the opinion to the value of the goods sold. *Ex Parte Eaglesfield,* 180 F. 558 (D.C. E.D. Wis. 1910); *Monroe* v. *Endelman, supra.*

In determining what is reasonable and what is confiscatory, courts have tended to recognize a distinction between businesses regarded as legitimate and those regarded as illegal in tendency. While the city may be given the power to single out for taxation either pursuits which are a matter of natural right or those made possible only by virtue of statute, higher fees are generally sustainable in the latter case than in the former on the theory that there is a public policy in favor of suppressing the business or at least restricting the numbers which engage therein. *City of Seattle* v. *Rogers,* 106 P. (2d) 598, Wash. (1940).

WILLIAM SMITH MALLOY.

Sales—Warranties by Express Representation.—Defendant set up a defense of breach of warranty in an action on a note given in a sale of dairy cows. In making the sale the plaintiff made the statement that, "these cows would have to be as recommended, first class dairy milk cows and six gallons a day they would give." He also promised to take back any cow that went wrong. Within two to four weeks after the purchase of said cows they began falling ill, and the entire herd became diseased. The infection caused the milk of the cows to become ropey and stringy; and it soured before it could be sold. The defendant counterclaimed for damages to his own herd. In affirming the decision of the lower court allowing damages to the defendant the appellate court quoted the clause of the Uniform Sales Act which provides that, "any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon," and held that the statement concerning the production of the cows was an affirmation of fact by the seller relating to the goods within the meaning of the provision of the Act above set out and was therefore an express warranty and not a mere statement of value, or seller's opinion, as claimed by the plaintiff, *Teter* v. *Schultz,* 93 N.E. (2d) 802 (Ind. 1942).

Although the court is guided by the provision of the Sales Act defining an express warranty it is, nevertheless, confronted with the problem of interpretation when it is required to determine if a particular statement of a seller is an express warranty within the meaning of the Act. In arriving at the conclusion that a statement is a warranty, the courts have applied various tests.

All courts agree that to constitute a warranty the affirmation of fact must be of a material fact. Typical of the application of this rule is the case of *Lloyd et al.* v. *James,* 198 Ark. 255, 128 S.W. (2d) 1019 (1939), where the court instructed the jury that, "before expressions rise to the dignity of a warranty, they must amount to a specific, definite, and certain representation of a fact that is material, and, if you find from all the testimony in this case that the expression of the salesman who sold the defendant the truck in the controversy did not definitely and certainly point to some material quality of the truck on which the defendant might rely and did rely, your verdict should be for the plaintiff."

No special words of warranty are necessary. The word warranty or its precise equivalent need not be used. "It is enough," said the Minnesota court in *Skoog* v. *Mayer Bros. Co.,* 122 Minn. 209, 142 N.W. 193 (1913), "if the vendor definitely undertakes that the thing sold shall be of a certain kind or quality."