North Dakota Law Review

Volume 27 | Number 4 Article 5

1951

Constitutional Law - Police Power of Municipality - Validity of Ordinance Declaring Door-to-Door Soliciting a Nuisance

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bankruptcy. Statutes of the type found in the instant case[7] are subject to the criticism that, standing alone, they fail to give protection to the judgment creditor who has already been injured. North Dakota meets this situation by allowing recourse to an unsatisfied judgment fund when the judgment debtor has no resources with which to pay, and the judgment is more than $300.00 and less than $10,000.00.[8] Massachusetts has met the situation by requiring compulsory liability insurance of all drivers.[9] This method, however, is open to the objection that it amounts to a subsidization of insurance companies or represents an instance of the state itself going into the insurance business. Nevertheless, it would appear that the requirement of compulsory liability insurance offers greater protection, at least in the case of residents of the state, than an unsatisfied judgment fund, since there is no minimum amount which is not covered.

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CONSTITUTIONAL LAW—POLICE POWER OF MUNICIPALITY—VALIDITY OF ORDINANCE DECLARING DOOR-TO-DOOR SOLICITING A NUISANCE—Appellant, representing a national magazine subscription company in charge of a crew of solicitors, was sentenced and fined by appellee city for violation of a city ordinance declaring that the going in and upon private residences within the city by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise without request or invitation, for the soliciting of orders or sale or disposal of their merchandise to be a misdemeanor and punishable as such. The Louisiana Supreme Court upheld the conviction and fine, whereupon appellant attacked the constitutionality of the ordinance in the United States Supreme Court. In finding the ordinance constitutional, over two dissents, the court *held* that it was not violative of due process, commerce clause or freedom of speech and press. While admitting that the knocker on the door is an invitation or license to attempt an entry, the court decided that frequent visits become a nuisance. *Breard v. City of Alexandria,* 71 S.Ct. 920 (1951).

Here involved is the ordinance commonly known in both lay and legal circles as the Green River ordinance because of its origin in Green River, Wyoming, in 1931. Its widespread adoption has produced a sharp conflict between the local police power and persons engaged in businesses which go directly to the prospective customer in his home. It represents a phase of the municipal police power which concededly is justified insofar as it relates to public health, morals,

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[7] N.D. Rev. Code c. 39-16 (Supp. 1949).
[8] N.D. Rev. Code c. 39-17 (Supp. 1949).
[9] Mass. Gen. Laws c. 90 (Tercent. ed. 1932).

safety, welfare and convenience.[1] However, the relation must be reasonable,[2] not arbitrary or discriminatory.[3] Local law can regulate the use of streets[4] and sidewalks[5] and prohibit their use altogether for purposes of sales or solicitation where the geographical classification is reasonable.[6] House to house peddling, soliciting and canvassing too are subject to reasonable police regulation and licensing.[7]

Heretofore, authorities have split upon the constitutionality of the Green River ordinance. It has been upheld in its state of origin,[8] federal circuit court,[9] and a few other states.[10] It has been declared unconstitutional in many state courts.[11] The bases of the decisions adverse to the ordinance are that it is discriminatory[12] and violative of due process.[13] The recent United States Supreme Court decision in the instant case brushed these decisions aside with little regard for the cogent reasoning contained in them. While the majority considers this ordinance to be merely regulatory, the dissent of Chief Justice Vinson more realistically recognized it as a flat prohibition of solicitation, a fact admitted by the supreme court of Louisiana[14] when this case was before it. The dissent also points out that the United States Supreme Court regards the solicitation of orders for goods produced in another state to be interstate commerce as much as the transportation of those goods.[15] To reconcile the present decision with this reaffirmed [16] view is difficult at best. Federal courts ordinarily look critically at statutes or ordinances which tend to discriminate against interstate commerce,[17] and unhesitatingly strike down those which do.[18] Despite the commendable purpose professed for the ordinance, and apparent absence of discrimination on its face, there is undeniably discrimination in fact.

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[1] McQuillin, Municipal Corporations, § 24. 322 (3rd ed. 1949).
[2] *Ex parte* Baker, 127 Tex. Crim. 589, 78 S.W.2d 610 (1934).
[3] Russo v. Morgan, 174 Misc. 1013, 21 N.Y.S.2d 637 (1940).
[4] People's Transit Co. v. Henshaw, 20 F.2d 87 (8th Cir. 1927), *cert. denied*, 275 U.S. 553 (1927).
[5] Wade v. City and County of San Francisco, 82 Cal. App.2d 337, 186 P.2d 181 (1947).
[6] Pittsford v. Los Angeles, 50 Cal. App.2d 25, 122 P.2d 535 (1942); Commonwealth v. Ellis, 158 Mass. 555, 33 N.E. 651 (1893). *But cf.* City of Buffalo v. Linsman, 113 App. Div. 584, 98 NY. Supp. 737 (4th Dep't. 1906).
[7] *Ex parte* Hartmann, 25 Cal. App.2d 55, 76 P.2d 709 (1938); People v. Passafume, 22 N.Y.S.2d 785 (1940).
[8] Town of Green River v. Bunger, 50 Wyo. 52, 58 P.2d 456 (1936).
[9] Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933), *rev'g* Fuller Brush Co. v. Town of Green River, 60 F.2d 613 (D. Wyo. 1932).
[10] *E.g.* McCormick v. City of Montrose, 105 Colo. 493, 99 P.2d 969 (1939); Green v. Town of Gallup, 46 N.M. 71, 120 P.2d 619 (1941).
[11] *E.g.* Prior v. White, 132 Fla. 1, 180 So. 347 (1938); Jewel Tea Co. v. City of Geneva, 137 Neb. 768, 291 N.W. 664 (1940); City of Qrangeburg v. Farmer, 181 S.C. 143, 186 S.E. 783 (1936).
[12] Whipple v. City of South Milwaukee, 218 Wis. 395, 261 N.W. 235 (1935); White v. Town of Culpeper, 172 Va. 630, 1 S.E.2d 269 (1939).
[13] Myers v. City of Defiance, 67 Ohio App. 159, 36 N.E.2d 162 (1940).
[14] City of Alexandria v. Breard, 217 La. 820, 827, 47 So.2d 553, 556 (1950).
[15] *See* Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 497 (1887).
[16] Nippert v. Richmond, 327 U.S. 416 (1946).
[17] Dean Milk Co. v. City of Madison, Wis., 340 U.S. 349 (1951).
[18] *Ibid.*

In the instant case there is also involved, but not discussed, the issue as to whether a municipality can transform by ordinance that which has always been a legitimate business into a public nuisance.[19] Such an extension of the general concept of what constitutes a public nuisance[20] could easily be considered unwarranted, even though the police power extends beyond morals, health and safety to encompass protection to the well-being and tranquility of the community.[21] The nuisance here, if an actual nuisance, tends to be private rather than public.[22] As such it is not subject to abatement by the municipality through a criminal ordinance.[23] It seems harsh to make criminal, by failure to strictly construe a penal statute,[24] the proscribed conduct which has always been a legitimate business.

The finality of federal decisions on constitutional issues would seem to place the future of the transient business man squarely in the hands of the local lawmakers, often composed of, or dominated or influenced by local business men. However, the impact of this recent decision may not be as broad or severe as it appears to be. State courts have declared this ordinance invalid on the grounds that municipalities have only delegated powers;[25] nuisances are defined only by common law or statute;[26] that the municipality was unauthorized to make it unlawful to carry on a lawful trade in a lawful manner,[27] or that such ordinances were unwarranted.[28] In these states the constitutional arguments are unnecessary and federal jurisdiction can be avoided. Where state courts uphold the ordinance the only satisfactory solution would appear to be legislation protecting householders who indicate a desire not to be disturbed, but allowing those who have no objection to be solicited in their homes.

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[19] To the effect that it cannot, see City of Osceola v. Blair, 231 Iowa 770, 2 N.W.2d 83 (1942); N.J. Good Humor v. Board of Com'rs., 124 N.J.L. 162, 11 A.2d 113 (1940).

[20] State v. Lee, 203 S.C. 536, 28 S.E.2d 402 (1943) (nuisance is public if it occurs in a public place, or where the public frequently congregates, or where members of the public are likely to come within the range of its influence, or if injury and annoyance are occasioned to such part of the public as comes in contact with it).

[21] *See* Kovacs v. Cooper, 336 U.S. 77, 83 (1949) (involved prohibited use of sound truck).

[22] Moon v. Clark, 192 Ga. 47, 14 S.E.2d 481 (1941) (A public nuisance damages all persons who come within the sphere of its operation).

[23] *See* Penna. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); 2 Dillon, Munic. Corp. § 684 (5th ed. 1911).

[24] Water, Light & Gas Co. v. Hutchinson, 207 U.S. 385 (1907) (Grants to municipal corporations, like grants to private corporations, are subject to the rule of strict construction).

[25] Jewel Tea Co. v. Town of Bel Air, 172 Md. 536, 192 Atl. 417 (1937).

[26] State v. Mott, 61 Md. 297 (1884); City of McAlester v. Grand Union Tea Co., 186 Okla. 487, 98 P.2d 924 (1940).

[27] De Berry v. City of La Grange, 62 Ga. App. 74, 8 S.E.2d 146 (1940).

[28] White v. Town of Culpeper, 172 Va. 630, 1 S.E.2d 269 (1939).