AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 6: Civil War and Reconstruction – Individual Rights/Property/Due Process

**Barling v. West, 29 Wisc. 307 (WI 1871)**

*On July 4, 1870, a clerk of Treat & Co. set up a lemonade stand in the door of the store in the village of Monroe, Wisconsin. As Barling sold lemonade to passerby during the Independence Day festivities, the president of the town walked past with the marshal. Upon seeing a crowd gathered at the lemonade stand, the president declared that Barling had fifteen minutes to take it down. Barling refused to do so, and the marshal took out his billy club. Barling in turn brandished his pitcher of lemonade. The president then called the aid of a nearby deputy and commanded that Barling be taken “dead or alive.” Barling was tackled and dragged before a justice of the peace, who ordered his release.*

*Barling sued for damages for an unlawful arrest and for the violence of his arrest, which left him lame for several days. The officers of village responded that their actions were justified by the ordinances of the village, which prohibited obstructions of the sidewalk and selling lemonade without a license. A jury awarded Barling $50. The officers appealed to the Wisconsin supreme court. The appellate court unanimously affirmed the trial court, holding that the village’s ordinance restricting the sale of lemonade exceeded the police powers of the state and intruded on the rights of the individual to pursue an innocent and lawful business.*

Justice COLE.

. . . .

The ordinance of May 4th, 1858, under which the block of stores was erected, one of which was occupied by Treat & Co. --the plaintiff's employers,--provides that the sidewalk on the west side of the square should be fourteen feet in width; the outside ten feet, or the ten feet thereof next to the traveled part of the street should be of a uniform grade, and should be kept clear of all obstructions of whatever kind, permanent or temporary, leaving the inside four feet next the stores without any grade, and to be occupied for the use of the stores. This, we think, is a fair construction of that ordinance. And it appears that the owners of the stores along the west side of the square have occupied the inside four feet for cellar ways, open and uncovered, but protected on the sides by iron railings from two and one half to three feet in height, which put out from the buildings along the margin of the cellar-ways; also, for stairways and places where tables are placed for showing goods, and for keeping boxes and barrels. And it was upon this inside four feet space, thus occupied by the owners of the stores for private use under this ordinance, that this lemonade stand was placed. This undoubtedly amounted to a permission and sanction on the part of the village authorities to the use of this inside four feet of ungraded walk in this manner by the owners of the stores. And, after, having thus sanctioned for years such an occupation of that space for private use, we think the officers of the village had no right to treat the stand erected there as being an unlawful obstruction of the sidewalk. . . .

. . . . The charter of the village conferred upon the trustees power to enact and enforce all such ordinances, rules and by-laws "for the government and good order of the village, for the suppression of vice, for the prevention of fires, for the benefit of trade and commerce, and for the health thereof," as they might deem expedient. Under the power thus conferred, the trustees enacted an ordinance prohibiting, among other things, the sale, at temporary stands or tables, "of any lemonade," etc., within the corporate limits,--with an exception not necessary to be noticed here,--without the person selling the same first obtaineda license therefor, under a penalty of ten dollars for each day or part of a day such person should so sell. The plaintiff clearly came within the prohibition of this ordinance; and, if the same is valid, we will assume for the purposes of this case that it would justify the defendants in attempting to enforce it in the manner they did. But we are clearly of the opinion that the ordinance itself, so far as it attempts to prohibit the sale of "lemonade, ice cream, cakes, pies, cheese, nuts, fruits," etc., without a license first obtained therefor, is in contravention of common right, is unreasonable, and must be declared void.

It is a perfectly well established principle of law, that a municipal by-law or ordinance must not be inconsistent with or repugnant to the constitution and laws of the United States or of this state; that it must be reasonable, and in harmony with the principles of the common law. *Mayor and Alderman of Mobile v. Yuille* (AL 1841). Now the sale of lemonade, ice cream, cakes, fruit, etc., is a perfectly lawful trade, and its restraint or regulation is not demanded by the public welfare; nor for the "good order of the village"; nor "for the benefit of trade and commerce"; nor for the public health of the citizens. Why, then, should the business be prohibited, or a person engaged in it be required to procure a license to carry it on, as if it were immoral or prejudicial to the public health, or to the goodorder of society? It seems to us that the ordinance is an invasion of private rights and an unwarranted interference with an entirely innocent and lawful business. In the case of *Hayes v. City of Appleton* (WI 1869), the chief justice remarks that a municipal by-law or ordinance "must be such as prudence and reason require, not unnecessarily prejudicial to private rights and interests, and not inconsistent with the laws of the state." And in *Austin v. Murray* (MA 1834), Justice Wilde observes that “the illegality of a by-law is the same, whether it may deprive an individual of the use of a part or of the whole of his property; no one can be so deprived unless the public good requires it. And the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation."

In the present case, the ordinance is a clear and direct infringement of the rights and privileges of the individual citizen who may wish to sell lemonade, cakes, fruit, etc., within the corporate limits of the village of Monroe, and is wholly unauthorized and most unreasonable. Nor can the power of the trustees to enact the ordinance be sustained under the taxing power. The ordinance was doubtless adopted with a view to revenue. But the power of raising money by taxation to defray the necessary expenses of the corporation, to meet its debts and various liabilities, is fully conferred in other provisions of the charter. And the right to enact and enforce proper ordinances does not imply or include the light to charge a license for engaging in a business which is perfectly innocent, and sanctioned by the general laws of the state. If there were any facts showing that this ordinance, requiring a license to sell lemonade, was essential for the health and good order of the village, it was incumbent upon the defendants to prove them on the trial. *Hayes v. The City of Appleton*. We are unable to conceive of any reason why the sale of such an innocent drink should be prohibited or restrained. The ordinance must therefore be declared void, and consequently would afford no justification for the acts of the defendants.

*Affirmed*.