AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 7: The Republican Era – Individual Rights/Property/Due Process

**Greensboro v. Ehrenreich, 80 Ala. 579 (AL 1886)**

*The charter of the town of Greensboro empowered it to pass any ordinance “necessary or proper to prevent the introduction of infectious diseases, and to preserve the health of the inhabitants of the same.” The town adopted an ordinance making it unlawful for any person to import or otherwise deal in “cast-off garments, blankets, bedding, or bed clothes,” excluding the sale of items that were “not imported, and that have not been used by persons having infectious diseases.”*

*Ehrenreich was arrested and convicted for violating the ordinance. He appealed to the state circuit court, and the conviction was reversed. The town appealed to the state supreme court, which affirmed the circuit court. The supreme court unanimously held that the city ordinance was beyond the scope of the state police power and an impermissible interference with a lawful trade.*

Judge CLOPTON.

. . . .

The legislature has undoubted power to authorize, and the authority conferred is ample, to pass ordinances on the enumerated subjects the prevention of the introduction of infectious or contagious diseases, and the preservation of the public health. Ordinances, having for their object the protection of the health of the inhabitants, which is one of the principal purposes and most important duties of municipal governments, are generally regarded as police regulations, subject to which the individual holds his rights of liberty and of property. Presumptions will be indulged in favor of their necessity, propriety, and validity, and when not unreasonable, nor partial, nor oppressive, nor inconsistent with the legislative policy of the State, should and will be sustained. Considered a part of a system of police regulations in aid of the preservation of the public health, the courts will not interfere with, or set them aside, unless the power has been manifestly transcended. By the grant of power, the character and special provisions of the ordinances are largely left to the discretion and judgment of the corporate authorities--"deemed necessary or proper,"--not, however, an absolute power to pass any ordinances, which they may perchance judge necessary or proper; not to be exercised capriciously, but with regard to the circumstances, the object to be accomplished, and the existing necessity. Notwithstanding the grant of power is general--"to pass and enforce ordinances deemed necessary and proper"--ordinances passed under the power must not be unreasonable, partial, or unfair; must not be in restraint of trade; nor contravene the general laws and public policy. It will not be presumed, that the legislature intended to clothe the municipal government with power to dispense with the requisites to a valid ordinance. The power will not be enlarged by intendment. And though the necessity and propriety of a particular ordinance is primarily of legislative determination, its character, whether reasonable, impartial, and consistent with the State policy, are questions for the court. *Ex parte Frank* (CA 1878).

The general statutes provide quarantine as the means to prevent the introduction of infectious or contagious diseases. To this end; any town or city may establish a quarantine ground; the corporate authorities may, from time to time, prescribe the quarantine to be observed by all vessels arriving within the harbor or vicinity; may extend such regulations to all persons, goods, and effects in such vessels; and may compel any person coming into town, by land, from a place infected with a contagious disease, to perform quarantine, and be restrained from traveling until discharged. The policy of the statutory provisions is the regulation of trade and travel by temporary restraint, not extending beyond the occasion and scope of the necessity self-defensive, which is the limitation on the police power of the State imposed by the Federal Constitution. *Railroad Co. v. Husen* (1878).The State cannot confer upon the subordinate agencies of the government powers which it does not possess, and cannot exercise. The general grant in the act of incorporation, it will be presumed, had reference to these and kindred regulations. We do not mean, that the corporate authorities may not adopt and provide other and additional regulations; but that they should be in accordance with the spirit and policy of the general statutes.

The professed object of the ordinance, as shown by the preamble reciting the recommendation of the officers and members of the board of health, is to protect the health of the community. While unquestionably the municipal government may pass sanitary ordinances for the preservation of health within its limits; may prevent articles of merchandise or other things which have been used by persons or in places infected with contagious disease, from being brought into the town; may establish quarantine and reasonable inspection regulations; and provide for disinfecting or destroying the germs of disease as far as practicable; and it may be, for obtaining satisfactory assurance that such articles have not been exposed to an infectious or contagious disease; the power cannot be carried beyond what is necessary for protection. It will not be controverted, that second-hand or cast-off garments, blankets, bedding, and bed-clothes are not, per se, introductive of infectious or contagious diseases; and that a lawful business selling or dealing in them, may be carried on without danger to the public health. They become dangerous by reason of the nature of previous use, condition, or exposure. This is virtually admitted by the proviso to the ordinance, which excepts from its operation the sale of the specified articles not imported, and that have not been used by a person having an infectious disease. The operation of the ordinance reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful trade, by permanently prohibiting the importation, selling, or otherwise dealing in the enumerated articles, though they may not have been used by persons or in districts, infected with such diseases. Municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell or otherwise deal in second-hand or cast-off garments, blankets, bedding, and bed-clothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because at some times and in some places, it is infected with trichina, or other kind of food, because liable to adulteration. That the ordinance is founded on the fear and apprehension of possible danger, and not on its existence, is shown by the unequal discrimination between articles imported and not imported. We cannot regard it a legitimate exercise of the power conferred by the act of incorporation. *Barling v. West* (WI 1871); *Mayor of Mobile v. Yuille* (AL 1841).

*Affirmed*.