

Opinion No. 333.

Cities & Towns—Ordinances—Constitutionality—Licenses—Peddlers and Hawkers.

HELD: A city ordinance prohibiting solicitors, peddlers and hawkers from going upon private premises without consent of owner or occupant, making certain exceptions and declaring a violation to be a misdemeanor and punishable, held constitutional and within the police powers of the city.

September 20, 1938.

Mr. J. W. Lynch
County Attorney
Fort Benton, Montana

Dear Mr. Lynch:

The City of Fort Benton has passed City Ordinance No. 166, prohibiting the practice of going in and upon private residences in the city by solicitors, peddlers, hawkers, etc., not having been requested or invited to do so by the owner or occupants of said residences for the purpose of soliciting orders for the sale of goods, wares and merchandise, and/or for the purpose of disposing of, and/or peddling or hawking such merchandise, and by the ordinance declaring such practice to be a nuisance and punishable as a misdemeanor. The ordinance makes an exception as to persons employed or representing an established merchant or business firm in your city, as well as an exception as to farmers residing in Choteau County, selling food items raised or produced by themselves, also excepts permanently established residents who are voters of your city.

Your ordinance further provides for the repealing of all other ordinances or parts of ordinances in conflict with the said Ordinance No. 166, and makes Ordinance 166 an emergency measure necessary for the preservation of the public peace, health, etc., thereby to become effective immediately upon its passage and approval. Your question then is, is such an ordinance constitutional and valid?

At the outset we might say that this question has been up before the courts quite recently in several instances, particularly referring to the States of Wyoming and Florida. Your ordinance is very similar in form to the ordinances questioned in both Wyoming and Florida, and the general laws governing the same are very like unto the laws of our own state.

The case of *Town of Green River v. Fuller Brush Co.*, 65 Fed. Rep. (2) 112, originated in the District Court of Wyoming and was carried on up to the Circuit Court of Appeals. This case seems to be the last word as far as the Federal Court is concerned and, in short, the Federal Court held that such an ordinance came within the police powers of the city administration, was constitutional and valid.

A subsequent case appears in Wyoming, that of *Town of Green River v. Bunger*, 58 Pac. (2) 456. The opinion in this case is very exhaustive and is a review of practically all litigation on the subject in the various states of our Nation and holds that the ordinance is constitutional and valid.

Florida, in the recent case of *Pryor v. White*, 180 So. 347, as late as April 6, 1938, holds a contrary view, voicing the opinion that the soliciting of orders is not so much of a public nuisance but rather, on the contrary, is a restraint of trade. The general opinion of the states, however, seems to be in line with the case of *Town of Green River v. Fuller Brush Company*, on the theory that the calling of peddlers, hawkers, etc., without invitation, is a nuisance; that it opens up a field for the commission of criminal offenses, and destroys the sanctity of the home and comes properly within the police power as to regulation.

The question of such an ordinance also came up in the case of *ex parte Hartman*, 76 Pac. (2) 709, a California case, and sustains the ordinance.

Section 4955, R. C. M. 1935, provides:

"A city or town is a body politic and corporate, with the general powers of a corporation, and the powers specified or necessarily implied in this chapter, or in special laws heretofore enacted."

This section, together with Section 4958, constitutes the general welfare clause, and under this general welfare clause it is well established that in the absence of statutory prohibition the city, in the exercise of its police powers, may establish all suitable ordinances for the administering of the government of the city, the maintenance of peace and order and the preservation of the health of the inhabitants.

McQuillin on Municipal Ordinances, Section 434;

Crum v. Bray, 121 Ga. 709, 47 S. E. 686.

Police power is very broad and comprehensive and is exercised to promote the health, comfort, safety and general welfare of society.

In re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

Section 5039.24, R. C. M. 1935, provides for the powers of city councils, gives them the power to prevent acts and conduct calculated to disturb the public peace or acts and conduct which are offensive to public morals. Section 5039.32 gives the city council the power to define and abate nuisances.

A city is a political subdivision of the state, a creature of statute, vested with such legislative powers as do not contravene with the Constitution or statutory provisions, and on attack of any of its ordinances on the ground of constitutionality, its validity should be upheld, if it is possible to do so; prima facie its validity is to be presumed and all doubts resolved in its favor.

State v. Stark, 100 Mont. 365, 368, 369.

I would say that the ordinance in question is not repugnant to constitutional or statutory provisions; that it is fair, impartial and consistent with recent general legislation.