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First Class Municipality--Adequate Police Power to Enact a Penal Civil Rights Ordinance

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occurred *as a matter of law*, represents an extreme position. It would seem to go even further than those states which provide by statute for a presumption of intent from the mere act of selling below cost, since the defendant might be deprived of an opportunity to negative a violation established as a matter of law and not merely presumed.

Nevertheless, demanding that a plaintiff prove a design to undermine the competitive system with each and every sale below cost might place an unrealistic burden on the plaintiff, rendering the statute ultimately ineffective. A sale below cost may or may not be made to injure competition. This is recognized by the exceptions specifically provided in *KRS* 365.040. Placing a burden of explanation upon the defendant who has sold merchandise or services below his own cost should not work any undue hardship if his conduct was directed to legitimate commercial ends. The motivations behind such a departure from ordinarily sound business practices are peculiarly within the knowledge of the actor and often difficult to prove. In most cases, the jury should determine whether the defendant's explanation is satisfactory.

The trial court should not have granted summary judgment against the plaintiff. On the other hand, stating that as a matter of law the statute seemed violated, and thus appearing to find conclusively the requisite intent from the mere act of making a free trial offer of a service, is likewise unjustified. The court may need to clarify its position by limiting the holding strictly to this fact situation, or by relegating much of what was said to the realm of dicta.

Eugene Mullins

FIRST CLASS MUNICIPALITY—ADEQUATE POLICE POWER TO ENACT A PENAL CIVIL RIGHTS ORDINANCE.—Whitson, doing business as the Corner Restaurant, was brought before the police court on warrants which charged him with violating the Louisville Penal Public Accommodations Ordinance by his refusal to serve food to Negroes in his restaurant. The lower court dismissed the charges on the ground that the ordinance was unconstitutional; the Jefferson Circuit Court held that the city of Louisville did not have sufficient police power to enact such an ordinance. One of appellee's defenses was that the general statutory powers of first class cities set out in *Ky. Rev. Stat.* 83.010-.012 [hereinafter referred to as *KRS*] do not authorize a compulsory integration ordinance because such ordinance is neither specifically authorized by the legislature nor indispensable to the operation

of city government. *Held:* The ordinance is constitutional. The court held that Louisville had adequate police power under the general charter for cities of the first class, particularly *KRS* 83.010, to enact a penal anti-discrimination ordinance. *Commonwealth v. William B. Beasy, Jr., d/b/a Dub's Fried Oyster Place & James Whitson d/b/a The Corner Restaurant,* 336 S.W.2d 444 (Ky. 1965).

This decision should significantly affect the legal strategy of the current nation-wide movement to promote the rights and interests of the Negroes. In the very few cases which arose previously, the validity of a municipal civil rights ordinance turned on whether the state had delegated to the city sufficient authority to adopt such legislation. In Kentucky, the only grants of power to cities to pass ordinances come in three sections of *KRS;* these provisions state that such cities shall have the power to enact any ordinances not in conflict with the laws and constitutions of the Commonwealth or the United States, which are deemed necessary "for municipal purposes," "for the welfare of the inhabitants," and "for the effective administration of all local government."[1] The court obviously took a broad view of the subjects which could be regulated by a city to promote the general welfare.

Because of the scarcity of previous primary or secondary authority for such a broad interpretation of the scope of the police power of cities, this decision is extremely relevant to the purposes of both civil rights leaders and municipal officials who must deal with these racial problems. The leading authority on municipal corporations, in the most recent edition of his works, stated that a municipality is usually without power to legislate upon, or to extend, civil rights.[2] Only three cases previously considered the power of a city to enact a public accommodations ordinance. *Nance v. Mayflower Tavern, Inc.*[3] is nearest in point with our Kentucky situation in terms of the position of the city involved vis-a-vis the sovereign state. In that case, the Utah Supreme Court held that neither the statute which authorized the city to tax, license, and regulate restaurants nor the constitution which authorized the city to exercise all powers relating to municipal affairs gave Salt Lake City the power to enact legislation requiring restaurants to serve all orderly persons. Two later cases have upheld such a municipal ordinance.[4] However, the city in each of these instances enjoyed a different relation to the sovereign power which

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[1] KRS 83.010-.012.

[2] 7 McQuillin, Municipal Corporations § 24.430 (3rd ed. 1949) [hereinafter cited as McQuillin].

[3] 106 Utah 517, 150 P.2d 773 (1944).

[4] District of Columbia v. John R. Thompson, Co., 346 U.S. 100 (1953); Marshall v. Kansas City, 355 S.W.2d 877 (Mo. 1962).

created it than did the city of Louisville to the State of Kentucky. In the *Thompson* case, the Supreme Court compared the power of the District of Columbia to that of a state; obviously there is a fundamental difference between the District of Columbia and an ordinary municipality. On the other hand, Kansas City is a municipal corporation under a home rule charter and not, like Louisville, a city whose only power comes from general statutory provisions in a state where there is no home rule. It is generally accepted that municipal corporations operating under home rule charters possess broad, if not full, police powers in affairs of local concern.[5] As there are no cases on the power of a city to enact fair housing or fair employment ordinances,[6] this Kentucky decision is very important for purposes of civil rights concerns because it establishes the principle that an ordinary first class municipality has adequate police power to enact a reasonable compulsory anti-discrimination ordinance.

A consideration of the nature and function of the municipal police power helps in the development of a sound rationalization for the doctrine of *Commonwealth v. Dub's Friend Oyster Place.* Cities have always used the police power to promote the general welfare, the traditional components of which are the health, morals, order, and safety of the community. Accordingly, this police power has been exercised for such familiar purposes as protective measures against fire, nuisance, disease, and crime; and the regulation of gambling, the sale of liquor, prostitution, waste disposal, streets, vehicles, and traffic. During this century, there has been an obvious trend toward extended exercises of the police power to protect the public from the evils of industry and business and to regulate political and labor activity in the community. Thus, at present, most courts accept the view that the municipal police power may be exercised to promote the general welfare in the broad sense—not only to provide for the public order, health, safety, and morals but also to further the public convenience and the economy of the community.[7] This history shows that the scope of the police power is neither rigid nor specifically definable but rather always developing so as to allow the power of government control to keep pace with the new demands of the community. Its very function requires that the power be largely "co-extensive with the necessities of the particular situation and sufficiently broad, comprehensive, and elastic to meet changing social,

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[5] 6 McQuillin § 24.33.

[6] McQuillin, *Municipal Fair Employment Ordinances as a Valid Exercise of the Police Power,* 39 Notre Dame Law. 607, 610 (1964).

[7] Chicago, B. & . Ry. v. Illinois, 200 U.S. 561 (1906); 37 Am. Jur. *Municipal Corporations* § 228 (1941).

economic, and political conditions."[8] Thus the exercise of the police power cannot be limited by precedent but must be invoked over new subjects as "social necessities relating to its ultimate objects" arise.[9] This view of the police power readily accommodates municipal civil rights ordinances as merely involving another area within the society which has become an appropriate subject to be reached reasonably in pursuit of the community welfare.

In this country, there is precedent for the view that legal enforcement of a policy of race relations is essential for the well-being of the community. Although today they are held invalid by reason of violation of the federal constitution, segregation ordinances in the past have been upheld by courts as valid exercises of the municipal police power.[10] The Kentucky Court of Appeals upheld a zoning ordinance of the city of Louisville which required that races live within defined zones.[11] There the court said:

> Nor are we disposed to concede that the ordinance here involved transcends the authority of the municipal legislature, or to doubt that it constitutes a valid exercise of the police power and a reasonable and expedient measure for the public welfare.[12]

The Supreme Court did reverse the decision[13] but not on this point. If the city has police power to require segregation on account of race, it should be considered to have adequate power to prohibit discrimination because of race.

A municipal civil rights ordinance is a valid exercise of the city police power because the reasonable regulation of race relations is presently closely related to community welfare. We live in a period of very intensified pressures for improvement in the social situation of the Negro. The effects of these forces, and of the counter-forces which they inevitably produce, are felt in every community where there is a mix of the races. Today and tomorrow, aggravated racial tensions will be as great a danger to the welfare of the community as fire and disease always are, and as crime, immorality, and the power of economic organizations can be. Just as cities early in this century had to cope with the excesses of a corporate economy in order to maintain the welfare of the community, so municipalities now must deal with one of the greatest problems confronting communities all

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[8] cc *Am. Jur. Municipal Corporations* § 276 (1941).
[9] 6 McQuillin § 24.10.
[10] Patterson v. Taylor, 51 Fla. 275, 40 So. 493 (1906); Hopkins v. City of Richmond, 117 Va. 692, 86 S.E. 139 (1915).
[11] Buchanan v. Warley, 165 Ky. 559, 177 S.W. 472 (1915).
[12] *Id.* at 570, 177 S.W. at 476.
[13] Buchanan v. Warley, 245 U.S. 60 (1917).

over the country—the new racial situation. Failure of the cities to provide for the necessities of this particular social condition will result in increased social, economic, and racial tensions which will endanger the continued peace, safety, prosperity, and general welfare of the community. Cities which have enacted fair employment practices ordinances have partially justified such regulation on this realistic appraisal of the relationship between race relations and community welfare.[14]

The guiding thought behind this comment has been a conviction that the problems of race relations are going to be with us for some time. If the municipalities fail to act in this area, the pressures will not cease but cause greater disruption in the community and shift their focus to other government centers, with the result that state and federal regulation will increase. Our American ideal is to handle social problems on a level of government as close to the people as possible. In the field of race relations, local legislation and enforcement are especially desirable, because particular conditions vary from area to area. In *Commonwealth v. Dub's Fried Oyster Place,* the court of appeals has decided that municipalities have the legal authority to deal with their own civil rights concerns. This decision thus gives the municipalities another chance to prove that local government can still meet problems of society in our present day.

Fred G. Karem

"CONFLICT" BETWEEN FEDERAL AND STATE LAW—ARKANSAS FULL CREW STATUTE PREEMPTED—Public Law 88-108[1] provided for a special arbitration board to make final resolution of issues in a dispute between certain railroads and unions deadlocked in collective bargaining procedures under the Railway Labor Act. A national railroad strike threatened. The board was limited to the issues and parties described in notices previously filed pursuant to the Railway Labor Act and was to follow its rules of procedure. The arbitration award finally promulgated under Public Law 88-108 contained rulings on numerous issues, including crew consist. The award declared that a "minimum" number of crewmen would be required on certain types of trains.

[14] Minneapolis, Minn., Ordinance to Prohibit Discriminatory Practices in Employment, Jan. 31, 1947; Cleveland, Ohio, Ordinance 15, 1579-48, Jan. 30, 1950.

[1] 28 August 1963, 77 Stat. 132.