

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF OCCUPATIONS.—

In a bill against the Real Estate Commissioners the attorney-general of Florida requested them to show the source of their authority. *State v. Rose* (Fla. 1929) 122 So. 225. He contended that the statute which created the commission, giving it power to license real estate brokers and agents on receiving evidence of their honesty and good repute was unconstitutional in practically all of its many provisions, particularly because it violated the Fourteenth Amendment by restraining citizens from entering a useful occupation, and therefore that it was an unjustifiable exercise of the police power. The act also contained provisions for the exclusion of nonresidents from the occupation. The court was divided on the constitutionality of this section, some of the judges being of the opinion that it did not comply with the requirement that the citizens of one state shall be given equal protection under the laws of every other state. The rest of the act (Fla. Laws 1927, ch. 12223) was found not unconstitutional. Although one provision of an act is void, it does not follow that the whole is bad. *Pollock v. Farmers' Loan & Trust Co.*, (1894) 158 U. S. 601.

This occupation is one of the last to be brought under general police power regulation, but similar statutes have been upheld, sometimes reluctantly, in the following cases. *Hoblitzel v. Jenkins* (1924) 204 Ky. 122, 263 S. W. 764; *Bratton v. Chandler* (1922) 260 U. S. 110; *Hall v. Geizer-Jones Co.* (1917) 242 U. S. 539; *Riley v. Chambers* (1919) 181 Cal. 589, 185 Pac. 855; *Payne v. Volkman* (1924) 183 Wis. 412, 198 N. W. 438.

In passing on the Ohio "Blue Sky" law regulating and licensing stock brokers, the court said that the equal protection clause of the Fourteenth Amendment does not prevent the states from regulating or eliminating a conspicuous evil. *Hall v. Geizer-Jones Co.*, above. The court said in *Hoblitzel v. Jenkins*, which concerns real estate brokers, that the legislature could not arbitrarily regulate a business or occupation unless it appeared to the court that its unrestricted pursuit imperiled in some degree the health, safety, morals or public welfare. However, the statute, providing for a commission similar to the one in the principal case, was held constitutional over the objection that it violated the due process provision and that it took private property without compensation.

Justice Strum in the principal case explained that the justification for such legislation lies in the fact that the pursuit of the occupation creates a fiduciary relation between the broker and the citizen, involving trust and confidence. It is generally known that this trust is often betrayed to the injury of the public. *Payne v. Volkman*, above, cited instances where unscrupulous brokers had made fortunes defrauding the purchasers of real estate. Land swindles are common occurrences during a boom or in a sparsely-settled country.

Admitting a prevailing evil, the constitutionality of such regulation is still for the court to decide. "A lawful and useful occupation may be subject to

regulations in the public interest, the test being whether or not the regulation goes further than throwing a reasonable safeguard around the exercise of the right." *Riley v. Chambers*, above.

The decision in the principal case is in harmony with the general attitude of the courts toward the regulation of this occupation which is well expressed by the *Payne v. Volkman* case, in which the court said, "Although such a statute is drastic we cannot say that it is unconstitutional."

H. V. C., '31.

CONSTITUTIONAL LAW—POWER OF CITY TO LICENSE SOFT DRINK PARLORS.—The proprietor of a grocery in Milwaukee was recently prosecuted under an ordinance of the city for selling flavored soda water, containing no alcoholic content, without obtaining the license required by the enactment. On appeal by the city from an acquittal in the court of first instance the issue was taken to the State Supreme Court, which declared the ordinance in question unconstitutional. *City of Milwaukee v. Meyer* (Wis. 1929) 224 N. W. 106.

By express provision in its charter the city had the power to regulate saloons, groceries and other places where spirituous, vinous or fermented liquors were sold or given away. Likewise, by state enactment, a license was required of all sellers of non-intoxicating but alcohol-containing liquors and beverages. The ordinance here involved was as follows: "No person, unless licensed [under state enactment] to sell non-intoxicating liquors, shall sell nonalcoholic beverages without a license to be granted by the common council in its discretion." Nonalcoholic drinks were defined as all flavored drinks commonly referred to as soft drinks, containing no alcoholic content. A license fee of five dollars per annum was fixed.

In declaring such an enactment unconstitutional the court seems to base its decision in the main upon the theory that an express grant of legislative power is a condition precedent to the validity of a municipal ordinance, and any attempted exercise of power must be brought within a reasonable construction of such a grant. That in itself is no doubt a valid position, but the application of that rule to void the ordinance here involved seems questionable at best. By statute the common council of the city was granted the power "to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language." Wis. Stat. (1927) sec. 62.11 (5). In view of this most general and liberal grant of power the holding of the court that the ordinance in question cannot be upheld as within the power of the common council seems erroneous. It would seem that the exercise of power by the council herein should be sustained as within a reasonable construction of the grant.

A much earlier case in the same jurisdiction was authority for the ruling