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## MUNICIPAL TRADE BARRIERS

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ROBERT J. PARRISH†

"Behind the move to repeal the City's . . . license ordinance which operates . . . as a tariff against itinerant . . . merchants is the smouldering threat of a trade war. . . .

". . . local dealers . . . fear nearby cities . . . may pass reprisal ordinances . . . .

". . . repeal would throw the market wide open . . . depriving local dealers who pay local taxes, of trade . . . ."

Indianapolis Times

October 26, 1940

To use the same figure of speech, it is only the outbreak of hostilities along new battle fronts which presents a smouldering threat because the truth is that war was declared a long time ago!

In the discussions of interstate trade barriers little has been said about municipal barriers<sup>1</sup> not for the reason that they are non-existent but solely for the reason that the sources of material<sup>2</sup> for the basis of discussion are generally inaccessible. In brief, local trade barriers and burdens spring from the same economic motives as do state and international tariff walls. Municipal trade barriers result from the demands made on city councils by local merchants and local industry based on the plausibly defensible ground that inasmuch as the latter represent one of the chief sources of local revenue they are entitled to, not an advantageous but a protected position, when they meet competition from non-local and frequently non-taxpaying competitors. Likewise,

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<sup>1</sup> As used herein the term trade barrier applies to ordinances which show a preference to resident tradesmen or businesses over non-residents. Ordinances restricting trade are not always labeled as such, nor is it always possible to discern the real intention of a council from a reading of an ordinance. One city created an effective barrier against the sale of coal brought from mines by individual truckers simply by amending its traffic code to prohibit the parking of vehicles loaded with goods offered for sale. Bloomington (Ord. No. 25, 1935).

<sup>2</sup> Ordinances used herein were gathered from twenty-seven cities by a state-wide Municipal Ordinance Project sponsored by the W.P.A. and the Bureau of Government Research, Indiana University. Throughout this discussion the reader should bear in mind that many of these ordinances have been repealed or are "dead letters".

in many instances the city councils can be convinced that the discriminatory regulations requested by local interests are merely incidental to the protection of health, safety and morality of the community. Thus, it is by means of their tax and police powers that cities erect municipal trade barriers.

In Indiana the source of municipal authority is the legislature. Municipalities are political subdivisions of the state possessing such powers as are expressly conferred by statute or which arise by fair implication.<sup>3</sup> Because the legislature cannot delegate a power it does not possess, state constitutional limitations on the legislature are *ipso facto* limitations on city councils. Likewise, those restrictions in the federal constitution limiting the powers of states apply equally to cities. For this reason, a city may not enact an ordinance which unduly interferes with interstate commerce,<sup>4</sup> nor can city ordinances be passed which have the effect of impairing contract obligations.<sup>5</sup>

Before examining the extent to which trade barriers

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<sup>3</sup> Courts usually say authority expressly stated or which may be reasonably implied or those which are necessary for the accomplishment of the declared objects and purposes of the city (Dillon's Rule). *Local Union No. 26 v. Kokomo*, 211 Ind. 72, 5 N.E. (2d) 624 (1937); *Walker v. Jameson*, 140 Ind. 591, 37 N.E. 402 (1895). A city cannot license a business in the absence of a statute conferring such authority. *Shuman v. Fort Wayne*, 127 Ind., 109 26 N.E. 560 (1891). Nor enlarge powers conferred by statute. *Jeffersonville v. Nagle*, 191 Ind. 70, 132 N.E. 4 (1921).

Courts will not inquire into the reasonableness of ordinances enacted pursuant to express legislative authorization, but an ordinance enacted by virtue of a general grant or of an implied power may be subject to judicial inquiry as to its reasonableness. *Gen. Outdoor Adv. Co. v. Indianapolis*, 202 Ind. 85, 172 N.E. 309 (1930); *Stuck v. Beech Grove*, 201 Ind. 66, 163 N.E. 483 (1929); *Champer v. Greencastle*, 138 Ind. 339, 35 N.E. 14 (1894). Under a plenary grant, a yearly license fee of \$250 for each pool table for hire is not unreasonable. *Wysong v. Lebanon*, 163 Ind. 132, 71 N.E. 194 (1904).

<sup>4</sup> *Robbins v. Shelby Co. Tax Dist.*, 120 U.S. 489 (1887). In *Sellersburg v. Stanford*, 209 Ind. 229, 198 N.E. 437 (1935) it was held that a drummer of a Kentucky company in which state the goods were located, was a peddler in a town where he solicited orders for goods delivered in the future. This is a sharp break from a line of cases declaring that ordinances regulating the sale, or negotiations for the sale, of goods located outside the state and to be delivered in the future are interferences with interstate commerce and unenforceable. *Rushville v. Heyneman*, 186 Ind. 1, 114 N.E. 69 (1917); *South Bend v. Martin*, 142 Ind. 31, 41 N.E. 315 (1895); *McLaughlin v. South Bend*, 126 Ind. 471, 26 N.E. 185 (1890); see *Martin v. Rosedale*, 130 Ind. 109, 113, 29 N.E. 410, 411 (1892).

<sup>5</sup> *Van Huffman v. Quincy*, 71 U.S. 535 (1866).

have found expression in the field of conscious, overt law-making, it should be noted that a most vicious policy of discrimination can be—and undoubtedly is—effectuated by unequal enforcement and administration of city ordinances. For example, the opportunity for favoritism in the issuance of local licenses offers untold possibilities for abuse. Also, the fact that unconstitutional ordinances are frequently enacted and that ordinance violators frequently are not financially capable of becoming litigants<sup>6</sup> add credence to the belief that an unconstitutional ordinance is often an effective trade barrier.

#### THE TAXING POWER

The municipal taxing power is a common device for the equalization of the competitive level between local residents who are taxpayers and non-locals who make no substantial contributions to the support of local government. In addition to exacting a license fee, one city imposed a tax of several per cent on the daily sales at auction of articles not produced or grown in the state.<sup>7</sup> Attacking the problem in a different way, an amendment to a city charter exempting from taxation certain personal property of residents, the purpose of which was clearly to place the resident businessman on the same competitive basis with certain non-residents who were escaping taxation, was approved by the Indiana Supreme Court in the case of *Fitch v. Madison*.<sup>8</sup> In approving this exemption the Court gave considerable weight to the fact that:

“Madison was a commercial city; many of her citizens were engaged in trade and commerce. . . . It was the common interest of the city that trade and commerce should be encouraged as it aided in bringing to the city both population and wealth.”<sup>9</sup>

As might have been inferred from the preceding discussion some municipal tax measures have the anomalous effect of favoring the non-resident. Consequently an ordinance requiring the same fee from the owners of all vehicles used

<sup>6</sup> Particularly is this true in the case of peddlers, hawkers, and itinerant merchants.

<sup>7</sup> New Albany (1842).

<sup>8</sup> 24 Ind. 425 (1865).

<sup>9</sup> *Id* at 428.

upon the streets, results in injury to the resident taxpayer. Thus the Supreme Court of Indiana, observed that:

“Indeed he (a non-resident wagon owner) is at an advantage as compared with the city resident; he has paid no taxes to improve the streets and yet he uses them day after day in his business quite the same as a resident . . . *If this ordinance favors anyone it is the non-resident rather than the resident.*”<sup>10</sup>

Elaborating on this position the court in *Terre Haute v. Kersey*<sup>11</sup> definitely decided that ordinances of this type were enacted as an exercise of the taxing power and not of the police power, as had been stated in a previous case. In a subsequent action involving the same parties it was held that since an attempt had been made to tax the vehicles of some non-residents, a vehicle tax ordinance was not invalid merely because it failed to tax the vehicles of all non-residents who habitually used the city streets.<sup>12</sup> When a city enacts two ordinances each imposing a fee upon vehicles, one as a tax and the other as a police measure, the owner of a vehicle for hire must pay both fees.<sup>13</sup>

It seems apparent that in the case of the vehicle tax ordinances cities were primarily concerned with raising revenue for the construction and repair of their streets. It is equally apparent, however, that under such a uniform tax policy a certain class of persons were receiving more municipal services than they were paying for. To meet such situations some cities exempted residents from taxation and others levied a special tax on “foreign” articles in an effort to make them “pay their way.” Thus, although infrequent, the revenue raising power has been used to close the fissures in a competitive economic system which geography sometimes creates.

#### LICENSING

By means of the licensing power the largest number of municipal trade barriers and burdens have been created. Although the constitutional limitations on ordinance-making previously set forth are applicable, ordinances of this type are

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<sup>10</sup> Tomlinson v. Indianapolis, 144 Ind. 142, 146, 43 N.E. 9, 10 (1895).

<sup>11</sup> 159 Ind. 300, 64 N.E. 469 (1902).

<sup>12</sup> Kersey v. Terre Haute, 161 Ind. 471, 68 N.E. 1027 (1904).

<sup>13</sup> Hogan v. Indianapolis, 159 Ind. 523, 65 N.E. 525 (1902).

usually attacked on the ground that they violate the privileges and immunities clauses of the state or federal constitution.

The privileges and immunities section of the Indiana constitution is violated by an ordinance which fails to provide a fixed and definite fee and which does not state the duration of the license.<sup>14</sup> It is violated further by an ordinance which allows the municipal authorities to discriminate arbitrarily in the issuance of licenses between citizens engaged in the same business.<sup>15</sup> Furthermore, in *Graffty v. Rushville* the Supreme Court of Indiana held that an ordinance making a two-fold territorial discrimination by licensing only non-resident hawkers and peddlers selling articles neither the growth nor manufacture of which occurred in the county was unconstitutional as violating the privileges and immunities section of the state constitution.<sup>16</sup> Indulging in a generalization—admittedly hazardous—it appears that many of the discriminatory techniques employed by Indiana cities against non-residents are unconstitutional. The only limitation was suggested by a *dictum* that:

“ . . . common councils may without doubt prescribe the qualifications in respect to residence . . . of those who may exercise vocations which are the proper subjects of police regulations. . . . ”<sup>17</sup>

Thus, a residence qualification as a condition for a license to engage in business is *prima facie* valid, although it may have the effect of absolutely prohibiting competition from non-residents and transients. In addition, in *Gordon v. Indianapolis*, the court held that cities may make reasonable classifications of persons engaging in business.<sup>18</sup>

<sup>14</sup> *Bills v. Goshen*, 117 Ind. 221, 20 N.E. 115 (1889).

<sup>15</sup> *Richmond v. Dudley*, 129 Ind. 112, 28 N.E. 312 (1891), *Plymouth v. Schultheis*, 135 Ind. 339, 35 N.E. 12 (1893).

<sup>16</sup> 107 Ind. 502, 8 N.E. 609 (1886), since the seller was not engaged in interstate commerce, the court went too far when it stated that the ordinance violated the interstate commerce clause of the federal constitution. An ordinance licensing breweries, distilleries and depots which, on its face, discriminates in favor of residents as against non-residents is invalid. *Indianapolis v. Bieler*, 138 Ind. 30, 36 N.E. 857 (1893). On the other hand, a similar ordinance drafted, however, so as to include within the definition of a “depot” only non-resident breweries shipping beer to resident agents for local delivery is not discriminatory as against non-resident breweries. *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N.E. 632 (1907).

<sup>17</sup> *Graffty v. Rushville*, 107 Ind. 502, 509, 8 N.E. 609, 612 (1886).

<sup>18</sup> 204 Ind. 79, 183 N.E. 124 (1932).

In reliance on these judicially approved powers most of the cities studied have adopted ordinances regulating persons and businesses. Itinerant merchant ordinances are by far the most common.<sup>19</sup> The validity of these ordinances has never been considered by the Indiana Supreme Court. But, since a state law licensing transient merchants does not violate the privileges and immunities section of the Indiana constitution,<sup>20</sup> a fair implication is that reasonable ordinances adopted under the authority of that statute are valid.<sup>21</sup> The earlier ordinances only licensed "foreign,"<sup>22</sup> "traveling,"<sup>23</sup> "transient,"<sup>24</sup> or "itinerant"<sup>25</sup> merchants. "Residents" were exempted.<sup>26</sup> In the later ordinances those persons, on the one hand, who are to be protected and those, on the other hand, who are to bear the burden are more clearly particularized. In some ordinances itinerant merchants have been defined as persons "not engaged in a permanent business in the city";<sup>27</sup> or who are "located temporarily in the city";<sup>28</sup> or as persons "who have not been residents of the city"<sup>29</sup> for a certain length of time; or as persons "who have no intention of becoming *bona fide* residents of the city."<sup>30</sup> These definitions are usually accepted as reasonable classifications of the trade.<sup>31</sup>

<sup>19</sup> There were sixty-nine ordinances covering a ninety-six year range (1842-1938) and during forty different years they were passed. During the period 1880-1890 sixteen ordinances were passed. From 1900-1920 fifteen were adopted, the majority during the latter ten years. Thirty-two were enacted from the World War to 1938. Fifteen were passed during the 1920's and fifteen during the first eight years of the 1930's. Twenty-two were enacted from 1925-1935.

<sup>20</sup> *Levi v. State*, 161 Ind. 251, 68 N.E. 172 (1903). "The classification . . . is a natural and reasonable one. . . ." *Id.* at 256, 68 N.E. at 174.

<sup>21</sup> Compare Ind. Stat. Ann. (Burns, 1933) § 42-409, with Ind. Stat. Ann. (Burns, 1933) § 48-1407 cl.37.

<sup>22</sup> Fort Wayne (January 4, 1842).

<sup>23</sup> Peru (May 12, 1857), South Bend (Ord. No. 394, 1875).

<sup>24</sup> Fort Wayne (April 24, 1874).

<sup>25</sup> Greencastle (February 27, 1856).

<sup>26</sup> Greencastle (February 27, 1856), Delphi (1866).

<sup>27</sup> Lafayette (March 25, 1889).

<sup>28</sup> Brazil (Ord. No. 557, 1889), Washington (May 8, 1893).

<sup>29</sup> Peru (December 9, 1884).

<sup>30</sup> Brazil (Ord. No. 557, 1889), Washington (May 8, 1893).

<sup>31</sup> It would appear that if the itinerant merchant, hawker, or peddler does not compete with the local resident, one of the justifications for a trade barrier disappears. Notwithstanding, these ordinances usually apply to the sale of "goods, wares or merchandise"; there is no recognition that the transient may offer for sale goods not sold locally. Consider the vending of "tropical fruits". In some

Still another technique which has been used for burdening itinerant and non-resident merchants is to license bill posting or the distribution of circulars or other advertising matters, exempting at the same time resident merchants advertising their own businesses. Ordinances of this type have been enacted by four cities.<sup>32</sup> In the case of *Eales v. Barbourville*, a Kentucky case, it was held that such an ordinance was void because it discriminated against non-residents.<sup>33</sup>

Attempts to exclude the itinerant photographer have been numerous.<sup>34</sup> As the license required applied only to those who go from house to house,<sup>35</sup> or to those who have no "established place of business"<sup>36</sup> (a business residence within a city of from three to twelve months)<sup>37</sup> by definition, resident photographers usually pay no license fees. Validity of differing classifications relating to those "making and selling photographs"<sup>38</sup> has not been doubted. Thus, a larger fee levied upon transient and traveling photographers than upon resident photographers it was decided in the Kansas case of *Caldwell v. Prunella*<sup>39</sup> does not invalidate the ordinance.

Another occupational group to feel the effect of muni-

places the transient seller went unlicensed. Lafayette (March 25, 1889). While in others he was expressly licensed. Greencastle (June 9, 1884), Brazil (Ord. No. 557, 1889). In the former perhaps the transient was the only source of supply.

It early became customary to exempt non-residents selling farm and dairy products. Peru (March 6, 1874), Brazil (Ord. No. 557, 1889). Non-residents vending books, newspapers and religious tracts were, also, exempted. Lafayette (March 25, 1889), Brazil (Ord. No. 557, 1889). Thus, in legislation dealing with itinerant merchants, hawkers and peddlers a consumer interest in foodstuffs, education, religion and the transmission of knowledge has been recognized; and, to that extent, a trade barrier policy is modified.

<sup>32</sup> Clinton (Ord. No. 42, 1933), Bedford (1902), Washington (August 8, 1898), New Albany (1894).

<sup>33</sup> 177 Ky. 216, 197 S.W. 634 (1917).

<sup>34</sup> Eighteen ordinances discriminated against non-residents. Thirteen were enacted from 1921-1936, nine being passed during the last six years. The ordinances, as a whole, covered a twenty-eight year period (1908-1936), and in eleven different years the discriminatory ordinances were passed.

<sup>35</sup> Marion (Ord. No. 5, 1933).

<sup>36</sup> Linton (June 6, 1921).

<sup>37</sup> Fort Wayne (Ord. No. 1768, 1933) Terre Haute (Ord. No. 10, 1933), Bedford (October 6, 1936).

<sup>38</sup> Brazil (Ord. No. 178, 1926), Sullivan (Ord. No. 91, 1925).

<sup>39</sup> 57 Kan. 511, 46 Pac. 949 (1896).

cipal trade barriers has been that of hawkers and peddlers.<sup>40</sup> At first, licenses were not required from residents.<sup>41</sup> In other cases licenses were issued only at the discretion of the mayor.<sup>42</sup> Both devices appear to be unconstitutional under the Indiana cases. The tendency lately has been, however, to license all hawkers and peddlers charging residents of the city and sometimes of the county a lower fee,<sup>43</sup> but even this provision was held by the court of a sister state to be discriminatory against non-residents.<sup>44</sup> Another common provision has been to exempt resident hawkers and peddlers who produce or manufacture the articles they sell.<sup>45</sup>

Junk peddlers are usually licensed under separate ordinances. There were two ordinances stating that to obtain a license the applicant shall be a "*bona fide* resident" of the city.<sup>46</sup> As previously stated, there is an Indiana *dictum* in support of the validity of residence qualifications as a condition for a license. Nevertheless, in the case of *Lipkin v. Duffy*, the New Jersey court held that the requirement that in order to obtain a license for the operation of a junk yard a person shall be a resident of the city for two years was an unreasonable discrimination against non-residents.<sup>47</sup>

Discrimination against non-resident auctioneers has been common in municipal ordinances.<sup>48</sup> Ordinances licensing only

<sup>40</sup> Peddlers go from house to house while hawkers sell at outcry. There were twenty-two ordinances discriminating against non-residents, half of which were passed before 1886. There is a striking absence of discriminatory ordinances from the 1890's to within the last few years. In the 1930's there was an increase in the number of such ordinances passed. The ordinances, as a whole, cover a seventy-eight year period (1856-1934); in eighteen years of this period the ordinances were enacted.

<sup>41</sup> Princeton (Ord. No. 10, 1873), New Albany (Ord. No. 184, 1861), Delphi (1886). An ordinance which exempts residents is void because it discriminates against non-residents. *Sayre v. Phillips*, 148 Pa. 482, 24 Atl. 76 (1892).

<sup>42</sup> Fort Wayne (April 24, 1874), New Albany (July 8, 1875), Terre Haute (November 8, 1886).

<sup>43</sup> Mishawaka (Ord. No. 718, 1932), Bloomington (Ord. No. 33, 1929), Whiting (Ord. No. 247, 1913).

<sup>44</sup> *State v. Orange*, 50 N.J.L. 389, 13 Atl. 240 (1888).

<sup>45</sup> Bloomington (Ord. No. 33, 1929), New Albany (October 3, 1904).

<sup>46</sup> Marion (Ord. No. 17, 1930), Kokomo (Ord. 2495, 1927).

<sup>47</sup> 118 N.J.L. 84, 191 Atl. 288 (1937).

<sup>48</sup> There were thirty-nine ordinances discriminating against non-residents, twenty-two having been enacted before 1890. The 1870's saw the greatest activity when eleven were passed. None was discovered in the 1920's and only three in the 1930's. Altogether they covered a ninety-year period (1841-1931), and the ordinances were enacted in twenty-eight years.

non-residents<sup>49</sup> would apparently be unconstitutional under the Indiana cases. Licensing residents at a lower rate than non-residents<sup>50</sup> might be unconstitutional also if the differential was unreasonable. As a rule, the ordinances exempt sales of articles the growth or manufacture of which took place in the county where the city is located, and the sales of live stock, farm utensils or household articles belonging to residents of the city.<sup>51</sup> In Indiana, a requirement that the licensee shall be a *bona fide* resident merchant in whose possession the goods shall have been for several months preceding the proposed auction<sup>52</sup> has been sustained; although among the cases elsewhere there is a split of authority.<sup>53</sup> Strangely, the policy of these ordinances appears to be dual and conflicting—to facilitate the sale of locally manufactured or produced articles and to protect local merchants selling in the regular course of business.<sup>54</sup>

In recent years several cities have passed ordinances regulating the sale at auction of jewelry, precious stones and metals. As a condition for a license these ordinances imposed a residence qualification either of six months<sup>55</sup> or a year.<sup>56</sup> In *Gordon v. Indianapolis* this was held to be a reasonable classification.<sup>57</sup> Although not passing upon this residence qualification the Court by way of *dictum* suggested that "... a transient stock, or that of an itinerant merchant, . . . is within the restrictive or prohibitive language of the ordinance."<sup>58</sup> This judicial utterance is expressive of the fundamental trade barrier policy. The information available points to the conclusion that it is the larger cities of the state, namely, those of the first, second, or third classes which have

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<sup>49</sup> Greencastle (1860), Delphi (1866), Kokomo (1867).

<sup>50</sup> Bloomington (Ord. No. 11 1876).

<sup>51</sup> Peru (May 5, 1857), Greencastle (March 23, 1869), Hammond (Ord. No. 11, 1889), Angola (Ord. No. 13, 1906).

<sup>52</sup> East Chicago (Ord. No. 2027, 1931), Hammond (Ord. No. 2191, 1930).

<sup>53</sup> A residence requirement as a condition for such a license is valid. *Moore v. Oklahoma City*, 161 Okla. 205, 17 P. (2d) 953 (1932). *Contra: Com. v. Loeb*, 245 Ky. 843, 54 S.W. (2d) 373 (1932).

<sup>54</sup> The policy to protect merchants selling in the regular course of business, also, finds expression in the Bulk Sales Acts. Ind. Stat. Ann. (Burns, 1933) § 33-201.

<sup>55</sup> Marion (Ord. No. 24, 1931).

<sup>56</sup> Mishawaka (Ord. No. 809, 1936), South Bend (Ord. No. 2860, 1930).

<sup>57</sup> 204 Ind. 79, 183 N.E. 124 (1932).

<sup>58</sup> *Gordon v. Indianapolis*, 204 Ind. 79, 83, 183 N.E. 124, 125 (1932).

found it necessary to protect their local jewelers against the competition of non-residents.

Ordinances licensing and regulating itinerant and non-resident laundry, dry cleaning and pressing businesses have been enacted recently by six cities.<sup>59</sup> That the ordinances result from active competition between local areas is evident from the location of the cities adopting the ordinances—two cities adjoin each other; two are sixteen miles apart; and the other two are within thirty-one miles of each other.

The methods of exclusion adopted by the ordinances are diverse. One method is to require a license from businesses having no principal office in the city;<sup>60</sup> another is to demand a fee for each truck, agency, or branch store used in the city when the garments are processed elsewhere;<sup>61</sup> and still another method requires non-residents to keep on deposit with the city building inspector a sum sufficient to pay all costs of visiting and inspecting the principal place of business.<sup>62</sup>

There is a clear conflict among the cases as to the constitutionality of ordinances of this type. On the one hand, the classification of persons according to their maintenance or non-maintenance of plants or places of business within the municipality has been held discriminatory;<sup>63</sup> while on the other hand, this fact has been held a sufficient basis for reasonable classification.<sup>64</sup>

Licenses also have been required from dealers in motor vehicles and motor vehicle parts. These ordinances generally are discriminatory. One city demands a license from only transient dealers.<sup>65</sup> Other cities impose residence requirements as conditions for a license.<sup>66</sup> Inasmuch as these ordinances were adopted by cities of the second and third

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<sup>59</sup> East Chicago (Ord. No. 3313, 1937), Hammond (Ord. No. 2423, 1937), Marion (Ord. No. 40, 1933), Peru (September 27, 1932), Brazil (Ord. No. 78, 1932), Terre Haute (Ord. No. 8, 1932).

<sup>60</sup> Brazil (Ord. No. 78, 1932).

<sup>61</sup> Hammond (Ord. No. 2423, 1937), East Chicago (Ord. No. 2213, 1937), Peru (September 27, 1932), Terre Haute (Ord. No. 8, 1932).

<sup>62</sup> Marion (Ord. No. 40, 1933).

<sup>63</sup> *Bueneman v. Santa Barbara*, 8 Cal. (2d) 405, 65 P. (2d) 884 (1937).

<sup>64</sup> *Richmond Linen Supply Co. v. Lynchburg*, 160 Va. 644, 169 S.E. 554, (1933) *aff'd* 291 U.S. 641 (1934), *reh. denied* 291 U.S. 648 (1934).

<sup>65</sup> Terre Haute (Ord. No. 7, 1931).

<sup>66</sup> East Chicago (Ord. No. 2280, 1939), Fort Wayne (Ord. No. 1931, 1938), Hammond (Ord. No. 2399, 1936), Marion (1930).

classes, the problem may be peculiar to the larger cities. Further, with one exception, each ordinance was adopted by a border city.

Even taxicabs and motor busses—the twentieth century counterparts of hacks and carriages—have felt the effects of the trade barrier policy.<sup>67</sup> In this group of ordinances the discriminatory techniques employed have generally been, first, licensing only non-residents<sup>68</sup> which is unconstitutional and, second,—in keeping with a modern trend which is constitutional—imposing residence requirements.<sup>69</sup>

Analogous to an interstate compact or agreement is the solution reached in one of those conflicts where each of two adjoining cities demanded a license from all persons operating cabs within the city.<sup>70</sup> After about a dozen years, one city now provides that its taxicab ordinance shall not apply to cabs from neighboring municipalities which only discharge and do not solicit passengers.<sup>71</sup>

Ordinances which license temporary businesses; bankrupt, fire, assignee sales, and branch stores are included here because one out of every five contained the very significant expression that they applied to goods “previously offered for sale elsewhere.”<sup>72</sup> Notwithstanding the apparent harmlessness of these ordinances, they seem to disclose a two-fold discrimination, namely, against non-residents and against merchandise brought into the city for sale other than in the regular course of business.<sup>73</sup>

Preference usually is given to local produce dealers. It will be recalled that under itinerant merchants, hawkers and peddlers ordinances it is unnecessary for farmers residing in

<sup>67</sup> Fourteen ordinances discriminating against non-residents were discovered and except for about the first quarter of this century they were enacted with periodical regularity. These ordinances covering a seventy-three year period (1863-1936) were adopted in twelve years.

<sup>68</sup> Sullivan (Ord. No. 101, 1886), Delphi (July 27, 1886), Terre Haute (1890).

<sup>69</sup> South Bend (Ord. No. 2979, 1932), East Chicago (Ord. No. 2176, 1936), Bloomington (Ord. No. 9, 1936).

<sup>70</sup> South Bend (Ord. 1817, 1915), Mishawaka (Ord. No. 443, 1916).

<sup>71</sup> South Bend (Ord. No. 2979, 1932).

<sup>72</sup> Although “elsewhere” could mean elsewhere in the city, the authors believe that it is the more subtle connotation of the word which is the true expression of the legislative intent.

<sup>73</sup> There were twenty-five ordinances, twenty-one of which were enacted in the period 1890-1910. Two such ordinances were passed in the early 1930's.

the county and selling their own produce to obtain licenses.<sup>74</sup> That some produce dealers "require" further protection is evidenced by those ordinances which require a license, first, from itinerant produce dealers<sup>75</sup> and, secondly, from those persons selling farm and dairy products from railway cars and warehouses, exempting commission merchants owning warehouses.<sup>76</sup> Another city apparently tries to solve the problem by demanding a permit for motor vehicles transporting property for sale, the buyer of which has not been determined at the point of destination by the person controlling the truck at the point of origin.<sup>77</sup> To the statement previously made that a city has an interest not to burden unduly the source of its food supply<sup>78</sup> must now be added the qualification that this protection will not be extended to foodstuffs produced beyond the immediate locality and which are brought from a distance into the city to compete with locally grown products. The constitutionality of these ordinances will be determined by the ease with which a court can be convinced that this legislation is aimed at the way in which a particular business is conducted, that there is a reasonable classification, and that there is no overt discrimination against non-residents as such.

Finally, there were ordinances licensing isolated trades and businesses but not occurring with sufficient frequency to justify separate consideration. It should be recorded that ordinances exist which discriminate in one way or another, against non-residents operating games of skill;<sup>79</sup> municipal markets;<sup>80</sup> plumbers;<sup>81</sup> undertaking and embalming;<sup>82</sup> building contractors;<sup>83</sup> scissor grinding, knife sharpening and umbrella repair;<sup>84</sup> and employment offices.<sup>85</sup>

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<sup>74</sup> See note 31 *supra*.

<sup>75</sup> South Bend (Ord. No. 3032, 1933).

<sup>76</sup> Terre Haute (Ord. No. 1, 1931), Hammond (Ord. No. 852, 1908), Peru (December 27, 1904).

<sup>77</sup> Bicknell (Ord. No. 165, 1935).

<sup>78</sup> See note 31 *supra*.

<sup>79</sup> Boonville (Ord. No. 7, 1937).

<sup>80</sup> Terre Haute (Ord. No. 26, 1925).

<sup>81</sup> Bedford (June 1, 1909), Brazil (Ord. No. 365, 1905).

<sup>82</sup> Hammond (Ord. No. 818, 1908).

<sup>83</sup> Lafayette (April 12, 1897).

<sup>84</sup> Terre Haute (June 20, 1882).

<sup>85</sup> Fort Wayne (April 24, 1874).

## POLICE POWER

Attention will now be directed to some of the more striking instances in which a trade barrier policy has found expression in municipal ordinances under the guise of the police power.

For the reason that practically all the itinerant merchant ordinances enacted during the last two decades required the merchants to post bonds, it can be said that this provision has now become a part of the permanent fabric of this type of ordinance.<sup>86</sup> The purpose of the bond ostensibly is to protect buyers injured through the deceit, fraud or misrepresentation of the seller. Since this provision applies only to itinerants the *bona fides* of such legislation may be questioned. But there can be no doubt that such a provision imposes a further burden upon the transient. The objections made against itinerant merchant ordinances apply with equal force to itinerant photographers<sup>87</sup> and the itinerant laundering, cleaning and pressing businesses<sup>88</sup> since they, too, are usually required to post bonds.

With almost the same speed with which the shot fired at Concord was "heard 'round the world," an ordinance passed by the Town of Green River, Wyoming, became famous over night and has been copied by other municipalities throughout the country. By the terms of this ordinance:

"The practice of going in and upon private residence . . . by solicitors, peddlers, hawkers, itinerant merchants and transient venders of merchandise, not having been requested or invited so to do by the owners . . . is . . . declared . . . a nuisance."

Suffice it to say that there is a split of authority as to the validity of these ordinances.<sup>89</sup> Although some Indiana cities have enacted such ordinances,<sup>90</sup> the question of their constitutionality has never been considered by the Supreme Court. That ordinances of this type are a most effective trade restriction is too obvious to require elaboration.

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<sup>86</sup> Brazil (Ord. No. 2065, 1925), Boonville (Ord. No. 3, 1926), Delphi (January 24, 1933), East Chicago (Ord. No. 2140, 1935).

<sup>87</sup> Brazil (Ord. No. 178, 1926), Sullivan (Ord. No. 91, 1925).

<sup>88</sup> Peru (September 27, 1932), Terre Haute (Ord. No. 8, 1932).

<sup>89</sup> Such an ordinance is a valid exercise of the police power. *Green River v. Fuller Brush Co.*, 65 F. (2d) 112 (C.C.A.10th 1933).  
*Contra: Prior v. White*, 132 Fla. 1, 180 So. 347 (1938).

<sup>90</sup> South Bend (Ord. No. 3136, 1935), Brazil (Ord. No. 94, 1933).

Also, under their police power several Indiana cities have greatly limited the distribution of handbills and other advertising matters. An ordinance prohibiting such distribution

“by placing or causing the same to be placed in any automobile . . . yard . . . porch . . . mail box . . . not in possession or under the control of the person . . . so distributing . . . ”

but exempting newspapers was upheld as a valid exercise of the police power in the case of *Goldblatt Bros. Co. v. East Chicago*.<sup>91</sup> In that case the Court said that the ordinance amply protected the privilege to distribute advertising matters where there existed a permission from the occupier of the property to come upon his premises.<sup>92</sup> In reaching its conclusion did the Court by implication decide that there was no implied invitation for distributors of advertising matter to come upon private premises? This is important in light of the fact that one of the principal grounds for declaring a “Green River” ordinance unconstitutional is, as some courts have said, that there usually is an implied invitation for business solicitors to come upon private premises.<sup>93</sup>

One city makes it unlawful to distribute handbills when the purpose is the financial gain of businesses outside the county.<sup>94</sup>

Even local printers came in for their share of protection at the expense of non-residents. The ordinances of some cities provide that “nothing herein contained shall be construed to authorize any merchant or dealer to circulate advertising prepared by . . . companies elsewhere.”<sup>95</sup> On still another occasion the municipal printing was guaranteed to local printers by means of an ordinance providing that all printing used and ordered by the city shall bear the imprint of the local trade council.<sup>96</sup>

#### CONCLUSION

In 1610 a custom of the City of London and a by-law passed to enforce it providing:

<sup>91</sup> 211 Ind. 621, 6 N.E. (2d) 331 (1937).

<sup>92</sup> *Id.*, at 623 6 N.E. (2d) at 332.

<sup>93</sup> *Prior v. White*, 132 Fla 1, 19, 180 So. 347,355 (1938).

<sup>94</sup> *Bluffton* (December 26, 1922).

<sup>95</sup> *Bedford* (1902), *Washington* (August 8, 1898).

<sup>96</sup> *Fort Wayne* (Ord. No. 153, 1900). This shows a preference also, for union printers.

"that no person whatsoever, not being free of the City of London, shall . . . keep any shop . . . or place whatsoever . . . to sell . . . or use any trade, occupation, mystery or handicraft . . . within said City . . . ."

were held to be valid.<sup>97</sup>

In 1934 the Indiana Supreme Court in support of a policy of discrimination against chain stores started with the major premise, that:

"This court has upheld statutes discriminating against the itinerant merchant and peddler in the interest of the local merchant. If protection of the local merchant is a sufficient basis for a policy of discrimination against peddlers and small itinerant merchants, it is difficult to see why it should not afford a sufficient basis for a policy of discrimination against chain store organization."<sup>98</sup>

That the present economy—and there have been former ones—sanctions trade restrictions is the only conclusion consonant with the fact that there is and has been a large number of trade barrier ordinances in Indiana. The "foreigner" is still looked upon with suspicion. It is generally felt that a taxpaying merchant has a stake in the community and his business deserves special protection.<sup>99</sup> When trade is too greatly restricted, however, it is the duty of the courts under our system of government to declare invalid the more flagrant violations of the constitutional taboos.

Lastly, throughout this discussion a non-partisan may have been impressed by the idea that the solution to this problem belongs, primarily, to the disciples of Adam Smith and, secondarily, to the disciples of William Blackstone.

<sup>97</sup> The Case of the City of London, 8 Co. Rep. 121 b, 77 Eng. Reports 658 (1610). To-day in England, however, there are apparently no such municipal trade restrictions. 32 *Halsbury's Laws of England* (2 ed., 1938) § 559.

<sup>98</sup> *Midwestern Petroleum Corp. v. State Bd. of Tax Comm.*, 206 Ind. 688, 703, 187 N.E. 882, 888 (1934).

<sup>99</sup> "The thing to be restrained is the putting of goods the owners of which may or may not have contributed by way of taxation to the benefit of the municipality, in competition with the goods of local merchants, *every dollar's worth of whose stock has been subjected to municipal taxation*, and who has contributed to the social, educational and financial prosperity of the city." *Graffy v. Rushville* 107 Ind. 502, 506, 8 N.E. 609, 611 (1886). In 1936 approximately 40,000 retailers listed merchandise, furniture or fixtures for taxation. "Since more than 60,000 store licenses were issued during that year, it would appear that a great many retail stores were escaping property taxes altogether." The Report of The Indiana Tax Study Sommission (1939) p. 19.