5634.

MUNICIPALITY—MAY ENACT CLOSING HOUR ORDINANCE FOR BARBER SHOPS—MAY ASSESS REASONABLE FEE TO ENFORCE ORDINANCE.

SYLLABUS:

The city of Youngstown may enact an ordinance similar to the one upheld in the case of Wilson v. City of Zanesville (130 O. S. 286) and may require all barbers in Youngstown to pay a license fee to defray the costs of administering and enforcing the provisions of such ordinance.

COLUMBUS, OHIO, May 28, 1936.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This will acknowledge receipt of your request for my opinion upon the following communication, which was received by you from the law director of Youngstown:

> "In the case of Wilson v. City of Zanesville, decided by the Supreme Court of Ohio in 130 O. S. 286, it was held that a municipal corporation could enact an ordinance regulating the hours during which barber shops might remain open for business within the corporate limits of a municipality.
>
> Council of the City of Youngstown is considering enacting an ordinance similar to the one enacted by Zanesville. City council has requested me to obtain from the Attorney General an opinion as to whether or not a municipal corporation may require barbers to be licensed in order to obtain funds to enforce the provisions of the ordinance regulating the hours during which barbering may be done. This latter question was not directly passed upon by the Supreme Court in the Zanesville case.
>
> I shall appreciate your submitting the question to the Attorney General for an opinion."

The syllabus of the case of Wilson v. City of Zanesville (130 O. S. 286), reported in the December 23, 1935 issue of the Ohio Bar, and which is referred to in the communication from the law director of Youngstown, reads as follows:

> "1. By the terms of Sections 3 and 7 of Article XVIII of the Constitution of Ohio, municipalities have power and authority to pass local police, sanitary and other similar regulations, provided they are not in conflict with general laws.

2. Regulations which are reasonable and have a definite relation to the public health, morals and safety, or to the general welfare, constitute a valid exercise of the police power.

3. A municipal ordinance which requires the closing of barber shops before eight o'clock a. m. and after six o'clock p. m. on Monday, Tuesday, Wednesday and Friday, before eight o'clock a. m. and after twelve o'clock noon on Thursday, and before eight o'clock a. m. and after eight o'clock p. m. on Saturday and days (other than Sunday) prior to certain named holidays, is not unreasonable, has a real and substantial relation to public health, morals and safety, is a valid exercise of the police power, and is constitutional."

The Supreme Court did not consider the question of whether or not the city of Zanesville had the authority to require a license fee from the barbers of that city to enforce the provisions of the ordinance. Likewise, the Court of Appeals in its opinion, which is reported in the April 27, 1936 issue of the Ohio Bar (51 O. App. 433) did not consider this question. It is significant, however, that the Zanesville ordinance in addition to providing for closing hours, requires that every person, firm or corporation maintaining or operating a barber shop in the city of Zanesville shall secure a license, to be issued by the mayor. The ordinance provides for an annual license fee of $2.00. Further, the ordinance makes it a misdemeanor to operate without a license or for a violation of the closing hours.

The Supreme Court, in the above case, referred to Sections 3 and 7 of Article XVIII of the Ohio Constitution. These sections read as follows:

Section 3:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Section 7:

"Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

The court in the opinion pointed out that under the provisions of the

Ohio Barber Law (Sections 1081-1, et seq., General Code), the legislature had not passed any measures which would limit the hours of labor by barbers or the number of hours in a day or week that a barber shop might be kept open. Consequently, at least until the state enters the field, the Supreme Court has held that municipalities may regulate the closing hours of barber shops under their general police power. However, Section 1081-16, General Code, provides that applicants for examination, etc., shall pay certain fees. In addition, Section 1081-16, General Code, provides an annual license fee of $2.00 from all barbers licensed in the state of Ohio. It is no doubt this fact that gives rise to your question which, as stated in your letter, was not passed upon directly by the Supreme Court.

In your letter you state the ordinance contemplates requiring a license fee from barbers to enforce the provisions of a similar closing hour ordinance to the one upheld in the Zanesville case. It appears that council contemplates the levying of a license fee and not of an excise or occupational tax. It is often difficult to distinguish between legislation based upon the police power and legislation based upon the taxing power. Licensing and regulation are said to be an exercise of police power, while the exaction of an excise tax is said to be an exercising of taxing power. There is no doubt but that the fee required of all licensed barbers in Ohio, under Section 1081-16, General Code, is a license fee and is not intended as an excise tax. However, a determination of that question is not necessary to determine your question, since you indicate the proposed fee from the barbers will be a license fee, intended to defray the expenses of enforcing the provisions of the ordinance.

An early distinction as to what constitutes a license fee based upon the police power and what constitutes an excise tax, was made in the case of Mays v. Cincinnati, 1 O. S. 268. The following language by Judge Ranney appears at page 273:

> "A license may include a tax, or it may not. If the exaction goes no further than to cover the necessary expenses of issuing it, it does not; but if it is made a means of supplying money for the public treasury, we agree with the court in State v. Roberts, 11 Gill & Johns, 506, that it 'is a tax is too palpable for discussion'."

Following the principles enunciated in the Mays case, supra, the Supreme Court of this state has had similar questions presented to that court. In the case of State, ex rel. Zielonka v. Carrel, 99 O. S. 220, relative to the power of the city of Cincinnati to pass an occupational tax, the following appears at page 229:

> "Reverting to the question of the power of Cincinnati to

levy occupational taxes, it is our conclusion that an ordinance of that character is a valid exercise of its legislative power, and unless and until the state itself invades the field, or expressly interdicts the exercise of the power, the authority of the city of Cincinnati to utilize such subjects of taxation must be upheld."

After the Carrel case, supra, the Supreme Court was called upon to make a distinction in those cases where the state has entered the field of levying what amounts to an excise tax. In the case of City of Cincinnati et al. v. American Telephone & Telegraph Co., City of Cincinnati et al. v. Norfolk & Western Ry. Co., City of Cincinnati et al. v. Western Union Telegraph Co., 112 Ohio St. 493, the syllabus is as follows:

"1. Sections 5483, 5485 and 5486, respectively, lay an occupational tax upon telephone companies, telegraph companies, and railroad companies.

2. The power granted to the municipality by Section 3, Article XVIII, of the Constitution of the State of Ohio, to lay an occupational tax in the exercise of its powers of local self-government, does not extend to fields within such municipality which have already been occupied by the state."

On page 498 the court used the following language:

"It is sufficient to say that the decision in the Carrel case, supra, declaring the right of the municipality to levy an excise tax at all, was arrived at by an interpretation of the constitution rather than by apt words therein found, and was then and since has been a subject of some doubt. That doubt having been resolved in favor of the power to the extent defined in that case, and that decision having been since approved and followed by this court in the case of Globe Security & Loan Co. v. Carrell, Aud., 106 Ohio St., 43, 138 N. E. 364, and the cases of Marion Foundry Co. v. Landes and Clawson v. Landes, 112 Ohio St., 166, 147 N. E., 302, it should now be regarded as the settled law of the state. The majority of this court are neither disposed to unsettle the law by overruling that case, nor to extend the power of municipalities in that respect by a further interpretation removing the limitation therein expressed.

That the levying of a tax is an exercise of sovereign power, that the sovereignty of the state extends to each of its four corners, within the municipalities as well as without, is not a subject of debate; that such sovereignty would be impaired by construing the constitution so as to give a subdivision of the state

equal sovereignty in so important a subject as that of taxation cannot be gainsaid.

To the end that the sovereignty of the state may be superior to that of any of its subdivisions in a matter so essential to that sovereignty as that of taxation, this court adheres to the interpretation of the power conferred by the constitution upon municipalities to levy an excise tax announced in State ex rel. Zielonka v. Carrel, supra, with the limitation therein expressed."

In the case of Firestone v. City of Cambridge, 113 O. S., 57, the Supreme Court had under consideration inter alia the question of whether a particular ordinance provided for the payment of a license fee or the exaction of an excise tax. The syllabus of that case reads as follows:

"1. The assessment of an annual fee by a municipal ordinance, upon owners of motor vehicles residing in the municipality, for the privilege of operating such motor vehicles upon the streets thereof, for the declared purpose of producing a fund to be used for the cleaning, maintenance, and repair of the streets of the municipality, to which use it is thereby appropriated, though denominated a license fee, is an 'excise tax.'

2. No municipality in this state has power to levy such excise tax in addition to that levied by the state for similar purposes."

An examination of the above cases, in the light of the decision of the Supreme Court in the Zanesville case, supra, does not diclose anything that would prevent the city of Youngstown from requiring a license fee from barbers to defray the cost of administering such ordinance. A well reasoned opinion with reference to this entire subject matter is to be found in the Opinions of the Attorney General for 1927, Volume III, page 1732. The syllabus of that opinion reads as follows:

"1. The power granted to municipalities by Section 3 of Article XVIII of the constitution of Ohio, to impose an occupational tax in the exercise of its powers of local self-government, does not extend to fields in such municipality which have already been occupied by the state.

2. The exaction of a license fee only by the state does not preclude the imposition by a municipality of an occupational tax in the exercise of the powers of local self-government.

3. The imposition by the state of an excise or occupational tax does not preclude the exaction of a license fee by a municipality in the exercise of its local police powers, but such license

fee must not be in excess of the cost of administering the police regulations.

4. The granting of a license for a particular privilege by the state does not prevent the exaction of a proper license fee by a municipality in the exercise of local police power."

The case of *Commodore Perry Hotel Co.* v. *Toledo,* being case No. 25032 in the Supreme Court, is of help in this connection. In that case an action was commenced in the Common Pleas Court of Lucas County to enjoin the enforcement of an ordinance of the city of Toledo. The Common Pleas Court dismissed the petition of the plaintiff. The Court of Appeals overruled the appellant's motion for a temporary injunction. No opinion was written by either court. The Supreme Court overruled the motion to certify and ruled that there was no debatable constitutional question involved. The ordinance in that case required places that sold beer and liquor in the city of Toledo to secure a license and pay a fee of $10.00 for such license. Among other things the ordinance established different closing hours than those which had been set by the state law. Plaintiff contended that the ordinance was in conflict with the state law which had granted him a license to do the very things permitted under the city ordinance and was also in conflict because the state law permitted him to stay open until a later hour. Likewise, plaintiff contended that he had paid a fee under the state law and, consequently, could not be legally assessed one under a city ordinance. An examination of this case will tend to support the conclusion reached in this opinion.

The following comment to be found in 19 R. C. L., page 803, is helpful:

"The mere fact that the state, in the exercise of the police power, has made certain regulations does not, however, prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal by-law are not in themselves pernicious, as being unreasonable or discriminatory, both will stand, but municipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state."

See also Ex Parte Hoffman (Calif.), 99 Pac. 517; Interstate Business Exchange Corporation v. Denver, 68 Col. 318, 190 Pac. 508, and Ex Parte Siebenhauer, 14 Nev. 365.

In the case of Ex Parte Siebenhauer, supra, the following appears at page 371:

"* * * * * * * * *

2. The city of Virginia, authority therefor being given in its charter, may require a license for conducting or carrying on any trade, business, or profession within its corporate limits, although an act of the legislature also requires a license to be taken out for conducting or carrying on the same trade, business, or profession within the county, and can enforce a penalty in case of a refusal to take out such license. * * *"

In the case of the City of Duluth v. Evans, 197 N. W. 737, the following appears in the third branch of the syllabus:

"A city ordinance, covering a subject also covered by state law, is valid if it is consistent with a state law and preserves the standard of regulation as molded by such general law."

In the case of *Schmidt* v. *City of Indianapolis,* 168 Indiana, 631, the court held, as disclosed by the fifth branch of the syllabus:

"5. An ordinance licensing breweries, distilleries and depots of same, is not invalid because there is a statute regulating same, where the ordinance provides for inspection by the health and fire departments and for the general control of same."

It is, therefore, my opinion, without prolonging this discussion and in specific answer to your inquiry, that the city of Youngstown may enact an ordinance similar to the one upheld in the case of *Wilson* v. *City of Zanesville* (130 O. S., 286) and may require all barbers in Youngstown to pay a license fee to defray the costs of administering and enforcing the provisions of such ordinance.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5635.

APPROVAL—BONDS OF CITY OF AKRON, SUMMIT COUNTY, OHIO, $15,000.00.

COLUMBUS, OHIO, May 28, 1936.

Industrial Commission of Ohio, Columbus, Ohio.