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Salt Lake City v. Andrew Revene : Brief of Plaintiffs

Utah Supreme Court

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E. R. Christensen; Gerald Irvine; A. Pratt Kessler; Clarence M. Beck; Attorneys for Plaintiff;

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In the Supreme Court

OF THE

State of Utah

SALT LAKE CITY, a Municipal
Corporation,

Plaintiff

vs.

ANDREW REVENE,

Defendant

No. 6330

PLAINTIFF'S BRIEF

E. R. CHRISTENSEN,
GERALD IRVINE,
A. PRATT KESSLER,
CLARENCE M. BECK,

Attorneys for Plaintiff.

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Heretofore the constitutionality of the Salt Lake City ordinance herein set out has been presented to the City Court three times and to the District Court three times; the validity of this ordinance has been sustained both by the City Court and Judge McConkie. Judge Schiller held the same to be ultra-viries while Judge Bronson seems to have held that the ultra-viries question did not arise in the case; that the only question presented was one of constitutionality. Judge McConkie held that the ordinance was constitutional and

not ultra-viries. The appeal here is from the order of Judge Bronson.

Plaintiff is of the definite and rather positive opinion that the only question presented is to-wit: *does the ordinance bear any reasonable relationship to the health, welfare, safety, or morals of the inhabitants of Salt Lake City or a substantial part thereof.*

We think the ordinance is constitutional and manifestly within the police power of the Board of Commissioners of Salt Lake City to enact; and we think in order to persuade the Court to this view it is only necessary to invite the Court's attention to the respective Utah statutes bearing upon barber shops, to the definition of the word "regulate" as defined in the Perry case, to two United States Supreme Court decisions and a recent Idaho decision to which we shall refer hereafter.

The ordinance is as follows, to-wit:

AN ORDINANCE AMENDING ARTICLE 6 OF CHAPTER VII, of the Revised Ordinances of Salt Lake City, Utah, 1934, by adding in and to said Article 6 a new Section to be known as Section 269, relating to closing of barber-shops.

Be it ordained by the Board of Commissioners of Salt Lake City, Utah:

SECTION 1. That Article 6 of Chapter VII of the Revised Ordinances of Salt Lake City, Utah, 1934, be and the same is hereby amended by adding in and to said Article a new section to be known as Section 269, relating to closing of barber-shops, which shall read as follows:

SECTION 269. CLOSING OF BARBER SHOPS. It shall be unlawful for the owner or operator of any barber-shop or for any agent or employee of such owner or operator of any barber-shop in Salt Lake City to permit such barber-shop to be or remain open for the business of barbering for a consideration, or otherwise, on Sundays, Thanksgiving Day, Christmas Day, New Year's Day, Washington's Birthday, Decoration Day, July 4th, July 24th, or Labor Day, or at any time other than the following:

From 8 o'clock A. M. to 6 o'clock P. M. on week days except Saturdays, when such days do not precede any legal holiday:

From 8 o'clock A. M. to 7 o'clock P. M. on Saturdays, and on any week day when such week day precedes any legal holiday.

Except during the business hours hereinabove defined, every barber-shop shall be closed and it shall be unlawful for any person operating a barber-shop to prevent a free and unobstructed view of such barber-shop by any method, or by the use of blinds, shades, screens, painted or frosted glass, or any such other device.

SECTION 2. In the opinion of the Board of Commissioners, it is necessary to the health, peace and safety of the inhabitants of Salt Lake City that this ordinance become effective immediately.

SECTION 3. This ordinance shall take effect 30 days after its first publication.

Passed by the Board of Commissioners of Salt Lake City, Utah, this 9th day of December, A. D., 1937.

E. B. IRWIN,
Mayor.

(SEAL)

ETHEL MacDONALD,
City Recorder,

BILL NO. 41

Published December 10th, 1937.

(Italics ours)

We assume that our adversaries will readily admit, (a). that the ordinance was passed because in the opinion of the City Commission the health, peace, and safety of the people of Salt Lake City were affected; (b). that this Court cannot pass upon the wisdom of the ordinance; (c). that the City Commission is the sole judge of the necessity of the ordinance; (d). that every presumption must be indulged in favor of the City Commission's decision; (e). that before the ordinance can be construed to be invalid, the City Commission must be declared to have acted obviously and undoubtedly in excess of its police powers; (f). where a business is admittedly the subject of regulation, the hours of closing is a part of such regulation; (g). where the invalidity of an ordinance is doubtful its validity is established; (h). that there is no taking of the property of the defendant where the disposition of it is only regulated, that everyone is subject to regulation under police power, and barbers are no more immune than others to this inconvenience; (i). that Salt Lake City regulates its butcher shops (an alleged necessary business) under its police power, and closes them at six o'clock at night; because it is incapable to inspect them at night; (j). that barbering is not a necessary business because and by reason of the fact that every service rendered in a barber shop can be had in the home; (k), that barbers engage in a purely personal service daily serving absolute stran-

gers, from which practice contagious and infectious diseases may and do spread unless strict regulations respecting sanitation and sterilization are enforced; (1). that the City Commission can and does, under its police power, recognize degrees of harm; (m). that the City Commission is presumed to have acted providently; (n). *that practically all of the trial evidence* (similar evidence upon which the ordinance is based) shows beyond rational doubt that the ordinance bears very directly upon health, safety and prosperity.

That the business of barbering obviously is the subject of regulation, is expressly disclosed by the following sections of the Revised Statutes of Utah, 1933:

Section 15-8-39: They (cities) may license, tax, and *regulate* . . . barber shops. . .

Section 15-8-84: They (cities) may pass *all* ordinances and rules and make *all* regulations not repugnant to law necessary for carrying into effect or discharging *all* powers and duties conferred by this chapter and such as are necessary and proper to provide for the *safety and preservation of health and promote the prosperity*, Improve the morals, peace, and good order, comfort and convenience of the City and the inhabitants thereof and for the protection of property therein and may enforce obedience to such ordinances with such fines or penalties as they may deem proper. (*italics added*).

Section 15-8-61: They (cities) may make all regulations to secure the general health of the City, prevent the introduction of contagious or infectious diseases into the City, etc.

Section 35-1-13: The health Commissioner may inspect during business hours the following named places

and objects for the purpose of ascertaining whether the same are maintained in a clean and sanitary condition, to-wit:

(1) The offices, equipment, tools, instruments . . . of all barber shops, barber schools, cosmeticians, etc.

Section 35-1-12: The State Board of Health may adopt reasonable rules and regulations prescribing sanitary requirements for . . . barber shops, babrber schools, etc.

Section 79-4-7: The Department of Registration may make rules and regulations governing barber shops not inconsistent with the rules and regulations with the State Board of Health.

Section 79-4-16: No barber, student, or apprentice practicing in this state shall knowingly serve a person afflicted with any contagious or infectious disease, but it shall be his duty to report the case of any such persons to the Department of Registration or local health officer, etc.

Section 79-4-18: The words "unprofessional conduct" as relating to barbers, students, apprentices, and teachers are hereby defined to include:

(1) Habitual intemperance or excessive use of narootics.

(2) Practicing when afflicted with a contagious or infectious disease.

(5) Keeping a shop, its furnishings, tools, utensils, or appliances used therein in unclean or insanitary condition.

Section 35-1-12: The State Board of Health may adopt reasonable rules and regulations prescribing sanitary requirements for . . . barber shops, barber schools, etc.

Section 79-4-1: The Department of Registration may make rules and regulations governing barber shops not inconsistent with the rules and regulations of the Board of Health.

Section 79-4-7: The Department of Registration shall have authority to make rules and regulations governing barber shops, etc.

By express legislative enactment there was obviously included in the grant of power to Salt Lake City the authority to pass all ordinances necessary to put into effect the regulation of barber shops respecting health and safety and, what is more important and far reaching, the power to put into effect and discharge all of the authority granted by the whole of Chapter 8 of the Revised Statutes of Utah, 1933, including expressly the power to regulate barber shops when such power concerns the convenience, comfort, health, morals, peace, good order, and prosperity of this city. There can be no escape from this conclusion because the grant is set out in express terms in Sections 15-8-39 and 15-8-4; therefore, if *"beyond a peradventure or a doubt the question as to whether or not fixing the hours for barbering business bears any real or substantial relation to public health, morals, safety, comfort, or convenience is an unalloyed question of fact."* (Judge Schiller's ruling) Then the fact that nearly 100 per cent of the trial testimony from practically every one of the witnesses points to just one conclusion, to-wit: that the fixing of hours for barber shops by the city is a part of the very woof and warp of the city's administration of its police power, regulating health, prosperity, peace, comfort, and conven-

ience of the city's inhabitants. This court is committed to this view by the case of *Perry vs. Salt Lake City*, 7 Utah 143, wherein the Court says, "*To regulate is to control, restrict and direct.*" But in the absence of the *Perry* case, there can be no escape from the conclusion that the ordinance is valid because *the two controlling factors present sustain the city*, to-wit: (1) The city admittedly has the right and authority under its police powers to legislate in behalf of safety and health; (2) the undenied facts as shown by the record manifestly foreclose any other conclusion because the facts are all one way and point to but just one conclusion. Practically every witness testified that closing hours not only improved greatly health and safety, but prosperity as well. The ordinance is not only backed up and sustained by the city's investigations and hearings, but by the *entire record* in this case. So if the test is arbitrariness or reasonableness on the part of the City, there just isn't any presumption, law, fact or ruling to the contrary.

The above mentioned ordinance is *presumed* to be valid. The burden is upon the defendant to prove that its provisions are so clearly unreasonable and arbitrary as to amount to depriving the defendant of his property without due process of law or that it is a down-right abuse of police powers manifestly in excess of legislative authority. In this behalf it is important to bear in mind the fundamental difference between a barber shop and, for instance, a grocery store, a hardware store, or a lumber yard. The barber shop is a place where services rendered are of a *purely personal* nature. They are

not absolute essentials. The City Commission says in Section 2 of the ordinance. "*In the opinion of the Board of Commissioners it is necessary to the health, peace, and safety of the inhabitants of Salt Lake City that this ordinance become effective immediately.*" The City Commission, being entirely familiar with local conditions, and presumed to know what the city's well-being requires, is primarily the judge of what is best fitted to protect the health, peace, and safety of the city's inhabitants. This Court is not in possession of the investigations, complaints, petitions, and agitation that brought on the enactment of this legislation, upon which the decision of the commission is based. The mere fact that this Court may differ with the City Commission in its views regarding that which is in the best interests of public policy and health or that this court may hold a fact or facts inconsistent with the opinion of the City Commission respecting the ordinance in question certainly affords no ground for judicial interference unless this Court finds that the ordinance is an unwarranted palpable invasion of police and legislative power. If the ordinance in question bears a reasonable relation to protection of the public health, safety, and welfare, it is not to be held for nought and set aside because the Court might be of a different opinion or that the ordinance will fail in its purpose or that it is *improvident*.

The police power is not a static thing, and must ever be exercised commensurate with changing times and conditions. 11 American Jurisprudence, page 1044, says:

"The general rule is well settled by a great many

cases dealing with almost every type of enterprise, trade, occupation, and profession that the state under its police power has the right to regulate any and all kinds of business in order to protect the public health, morals, and welfare, subject to the restrictions of reasonable classification . . . Another rule which is well settled is that there can be no doubt of the right of the state to regulate a business which may become unlawful by the use of improper and unlawful means, since the right to exercise the police power is a continuing one, and a business lawful today, may in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare and be required to yield to the public good."

To apply principles 50 or 75 years old to circumstances no longer existing and to refuse to inhibit new evils fearful of curtailing outworn precedents is to fly in the face of modern economics, sociology, necessities and times. It seems altogether reasonable to assume that because of modern competition, multiple-chair barber shops, great and increasing transient trade, and new and modern discoveries respecting the spread of contagious and infectious diseases that among the reasons for enacting this ordinance were: (1). To enable municipal authorities to fix a definite time within which their inspectors might readily and adequately perform their duties with respect to such places. (2). To protect the City against financial cost because it costs money to keep track of barber shops behind closed blinds at all hours of the night. It costs money to inspect barber shops at night. (3). There is no machinery set up with which to inspect barber shops at night. (4). That it is a matter of common knowledge that

some barber shops compare with pool halls as a loitering and loafing place. (5). That a tired barber is a negligent barber. (6). That barbers are entitled to a reasonable rest period. (7). That barbers are entitled to spend at least some daylight time with their families. (8). That barbers are entitled to protection against cutthroat and demoralizing competition. (9). That the barber business generally should be conducted with system and order.

The City Commission, in the enactment of this ordinance, was free to recognize degrees of harm and it was free to confine its inhibitions where, in its opinion, they were deemed best fitted for the public welfare. There is no "doctrinaire requirements" that the Commission should enact an ordinance bringing every business within its perview. If the ordinance improves conditions where they are most noticeably felt and seem to be, it is not to be overthrown because other people and other instances could also be corrected and improved. A city has a wide discretion in determining what precautions to take in behalf of the public well-being.

A reading of the record and cases discloses that there is absolutely no dispute about the fundamental propositions of law and of fact which we have thus far stated and if there are any differences of opinion that arise because of the application of the facts in this case, it seems to be well-established law that the application of the facts here rest surely within the discretion of the City Commission; it is not only their duty but their right to exercise their opinion. The City Commissioners were elected for the very purpose of investi-

gating, weighing, and studying the very facts, conditions, and circumstances upon which they based their decision to enact this ordinance. So because of their familiarity and closeness with these facts, this ordinance should stand without interference of the judiciary.

Changed and modern social and economic circumstances, are shown abundantly, on every hand, these changes have given a new meaning, application and interpretation to constitutional law wholly unthought of previously. Complex and streamlined modern civilization has required and does require a legion of restrictions on personal rights as well as property rights. That which was not public welfare before under the then conditions of society, morals, necessity, and economic conditions has now become public welfare, and where new conditions arise affecting the safety of the public that can be avoided, these conditions must be met by police regulations and such regulations obviously are necessary within the framework of the police structure of State, County, and City government. How else could public safety, morals, etc., be providently protected, supported, or improved?

In each police power case presented, the judiciary is called upon to draw a line of demarcation, but the judiciary does not attempt to define police powers with meticulous exactitude — it is utterly impossible to do; so inevitably where the city has an abundant and broad discretion, each individual case must stand upon its own footing. Hence, we

say it is fundamental that one branch of commonwealth cannot encroach upon the domain of another branch, especially when dealing with the police powers, without treading a path fraught with danger. Indeed, it is a fundamental principle of jurisprudence *it is the duty of the judiciary to save a statute or ordinance* and not to destroy it. As between two possible interpretations of an ordinance, one by which it would be unconstitutional and by the other valid, it is the obvious duty of the judiciary to adopt that interpretation *which will save the ordinance*; and furthermore, it is the well-settled law that every possible presumption is in favor of the validity of an ordinance and this presumption continues until the contrary is shown beyond a reasonable doubt.

The case of *Soon Hing vs. P. Crowley*, Chief of Police of the City of San Francisco, 28 Law. Ed. 1145, we think, commits the Supreme Court of the United States to our view on all fours, (and this case has not been recently overruled but on the contrary recently approved), the facts in that case are really stronger in our favor than in this appeal, because the hours limiting the opening and closing of laundries were restricted to just one section of the City of San Francisco. The city had passed an ordinance which in effect provided that no person could work in a laundry or public wash house within certain prescribed limits between the hours of ten in the evening and six in the morning, or upon any portion of Sunday. The questions presented by the case were:—a—whether the ordinance was void on the ground that it was not within the police power of the City of San

Francisco; —b— whether the ordinance discriminates between those engaged in laundry business and those engaged in other lines of business; —c— whether the ordinance is void because it discriminates between different classes of persons engaged in the same and different classes of business; —d— whether the ordinance is void on the ground of depriving a man of the right to labor at all times; —e— whether the ordinance is void on the ground it is *unreasonable*; —f— whether the ordinance is in restraint of trade; and deprived a person of property without due process. All very familiar, the same identical questions and arguments exactly that are presented by this appeal.

It would seem that the only difference between the above case and the case at bar is the fact that in San Francisco the opening and closing of laundries was fixed by ordinance and in Salt Lake City the opening and closing of barber shops is fixed by ordinance. Mr. Justice Field, in writing the opinion unanimously concurred in, says:

The prohibition against labor on Sunday in this section is not involved here, as it was not in that case; and the provision for the cessation of labor in the laundries within certain prescribed limits of the city and county during certain hours of the night is purely a police regulation, which is, as we there said, within the competency of any municipality possessed of the ordinary powers belonging to such bodies. Besides, the Constitution of California declares that "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Art. XI., Sec. 11 . . . At any rate, of its necessity for the purpose des-

ignated, the municipal authorities are the appropriate judges. Their regulations in this matter are not subject to any interference by the federal tribunals unless they are made the occasion for invading the substantial rights of persons, and no such invasion is caused by the regulation in question. As we said in *Barbier vs. Connolly*, "The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed." No invidious discrimination is made against anyone by the measures adopted. All persons engaged in the same business within the prescribed limits are treated alike and subjected to similar restrictions.

There is no force in the objection, that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not required to cease from their labors during the same hours at night . . . The objection that the fourth section is void on the ground that it deprives a man of the right to work at all times, is equally without force. However broad the right of everyone to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men, notwithstanding the liberty which is guaranteed to each. It is liberty regulated by just and impartial laws. Parties, for example, are free to make any contracts they choose for a lawful purpose, but society says what contracts shall be in writing and what may be verbally made, and on what days they may be executed, and how long they may be enforced if their terms are not complied with. So, too, with the hours of labor. On few subjects has there been more regulation. How many hours shall constitute a day's work in the absence of contract, at what time shops

in our cities shall close at night, are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld, not from any right of the Government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States. . . . And the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the Acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments.

The Supreme Court of the United States had before it a second time another phase of this laundry ordinance, in the case of *Frances Barbier vs. Patrick Connolly*, 28 Law Ed. 923. Similar questions were again involved, to-wit: (1). That a certain section of the laundry ordinance discriminated between classes of laborers engaged in the laundry business and those engaged in other kinds of business: (2). that the ordinance discriminated between laborers beyond the designated limits and those within them. (3). that it deprived petitioners of the right to labor, and as a necessary consequence, of the right to acquire property.

The court, in the delivery of its opinion, said:

That 4th section, so far as it is involved in the case before the police Judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. . . . But neither the Amendment, (14th Amendment) broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity . . . Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.

The case of California Reduction Company vs. Sanitary

Reduction Works of San Francisco, 126 Federal 29, 50 Law. Ed. 204 holds that laws or ordinances enacted under police power for the protection of the public health reasonably adapted to that end are not unconstitutional because they may incidentally operate to deprive individuals of their property or its use without compensation, or interfere with their personal liberty, nor because they may give one person a monopoly of a certain business or occupation, private rights being required to yield in such case to the public good.

A barber shop closing ordinance very similar to the ordinance here involved was presented to the Supreme Court of New Jersey in the case of *Falco vs. Atlantic City, et al.*, 122 Atl. 610, wherein the Court said:

“So far as it relates to the provisions of the Act of 1917 permitting regulation of the opening and closing hours, this is also within the police power. In *Barbier vs. Connolly*, 28 Law. Ed. 923, and *Hing vs. Crowley*, 28 Law. Ed. 1145, regulations of hours of closing public laundries was considered by the Supreme Court of the United States, and held not in violation of the Fourteenth Amendment. We fail to see any merit in the constitutional point. Nor can it be said judicially that the ordinance fixing 9:00 p. m. on Saturdays and 8:00 p. m. on other weekdays as the closing hour is unreasonable. If it be reasonable to set a closing hour, and we think it plainly is, that hour must be left to the discretion of the municipal authority. Where such authority is empowered to use its discretion in passing ordinances, the implication is that they shall be reasonable; but every intendment is in favor of their reasonable character and unless plainly unreasonable the court will not interfere. *McGonnel vs. Orange*, 121 Atl. 135-

138, and cases cited. So *considered the regulation in question is not unreasonable*. It seems probably that one reason for the legislation upon which it rests was to enable municipal authority to fix a definite time within which their inspectors might readily and adequately perform their duties with respect to such places.” (Italics added.)

That a municipal ordinance regulating the business hours of barber shops is a constitutional exercise of police power is sustained by a unanimous Ohio Court in the case of *City of Zanesville vs. Wilson*, 1 N. E. 2nd, 638, wherein the Court says:

“It must be conceded that that which was not public welfare fifty years ago under the then conditions of society, morals, necessities, and commercial conditions, may in this present age be considered public welfare . . . It is in one sense professional in its character of the service, that is, its purpose is to do for those of the public who enter a purely personal service wherein cleanliness and sterilization of implements and tools of the trade are matters of public concern, without which the patrons may become the innocent victims of communicable diseases or unintentional conveyors of such to those who are not patrons. In congested communities like Zanesville, barbers may not know all the patrons and unless care be taken, skin and blood diseases may be easily communicated by the artisans own careless act. . . . The objection that the fourth section is void on the ground that it deprives a man of the right to work at all times is equally without force. However broad the right of everyone to follow such calling and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the acts of men notwith-

standing the liberty which is guaranted to each. It is liberty regulated by just and impartial laws.”

Barbier vs. Connolly and Soon Hing vs. Crowley, *supra*, are cited with approval.

This Zanesville case under the style of Wilson vs. the City of Zanesville, later went to the Supreme Court of Ohio, 199 N. E. 187,, wherein the Court says:

“The Court has repeatedly sustained curtailing of enjoyment of private property in the public interest. The owner’s rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community . . . The Constitution does no guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited and the right to conduct a business or to pursue a calling may be conditioned . . . *Enough authority has been cited to make it plain that hours of business as well as hours of labor may be regulated and restricted in proper cases in the lawful exercise of the police power.* It is next in order to turn to provisions relating to barber shops; it seems to be universally conceded by the courts that the barber trade may be licensed and inspected in the interest of public health and many cases are collected upholding provisions of this character as constitutional and within the police power in 20 A. L. R. 1111 and, 98 A. L. R. 1089 . . . In Patton vs. Bellingham, Blake, J., in his dissenting opinion, said, 179 Washington 566 at page 582; 38 Pacific Second 364, 98 A. L. R. 1076:

“. . . Looking through the pretext and at the reality, the purpose of this ordinance is to curb competition, of the *chain store character in the barber trade.* And it is every whit as justifiable as the laundry ordinance. The chain shops, by working two or three shifts,

can keep open 12, 16, or 24 hours. In order to live, the one-or two-chair shops must keep open for a like period; thus, through economical necessity, men in the latter shops are forced to work for a length of hours to deprive them of the leisure that makes life worth living. The power of the State to enact legislation to alleviate such conditions is inherent. Such legislation is grounded in the State's rights to protect all persons from physical and moral debasement, which comes from uninterrupted labor . . . Shall this court say to the municipality that regulatory measures are necessary and proper with reference to barber shops, but that none must be adopted which prevents a man who works during the day at other labor from plying the barber trade at night and thus risking the health of his patrons when he is unfitted through the travail of a day already done to properly perform his duties as a barber? . . . We are of the opinion that the provisions of the ordinance under inquiry are neither unreasonable, discriminatory, arbitrary, nor capricious, and that they bear a real 'and substantial relations to the objects sought to be attained, namely *public health, morals, and safety.*' Italics ours).

Both sides of this question are presented in the Idaho case of *Pearce v. Moffatt*, 92 P. (2d), 146. Boise City enacted an ordinance almost word for word with the Salt Lake City ordinance. It fixed 8:00 o'clock a. m. as the opening hour and 6:00 o'clock p. m. as the closing hour on week days, except 8:00 o'clock p. m. on Saturday as the closing hour. Chief Justice Ailshie wrote the opinion holding the ordinance constitutional. The Idaho statute, however, was held unconstitutional because it included only cities of a certain class and excluded others. Speaking generally upon

the question of the constitutionality of the question involved, the Chief Justice aptly says:

“Now after the barber has complied with all those provisions and opened a place for the practice of his ‘art or science,’ why may not the legislature, in the further pursuance of its desire and discretion to protect the health and general welfare of the people who may patronize this scientific artist, say to him:

“ ‘You are going to have all kinds, classes and ages of people in your shop. Some may be carrying highly contagious diseases, some may be infected with dangerous bacteria; you will be employed to practice your art on persons in ill health; and at the same time you will not know of this danger to both you and your patrons except as you may discover it from ocular observation. Such persons will not only endanger your health but the health and safety of your other patrons; and in the long run, affect the health, happiness, and welfare of their families.

“ ‘We are therefore going to require you to close your shop at a certain hour every successive 24 hours and you and any employees you may have working in your shop may at the same time have rest and recreation, and your shop may be inspected and be given any necessary sanitary treatment. And we are going to make the same requirement of all persons practicing your art.’ ” . . . The owner’s property right in the building can certainly be no more valuable nor sacred under the constitution than his right to labor. In other words, the property right of a man to work and to reap the earnings of his labor is equally as sacred under the constitution as the property right of the man who owns the building in which the laborer works. Municipal ordinances and legislation regulating the hours of work have been almost uniformly recognized in the decisions of the courts ever since the decision of the Supreme

Court of the United States in *Barbier v. Connolly*, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923, and *Soon Hing v. Crowley*, 113 U. S. 703, 5 S. Ct. 730, 734, 28 L. Ed. 1145. . . . Furthermore, we can not close our eyes to what everyone else knows, namely, that those who run barber shops are in competition with each other for business just as other business concerns, and in order that each may establish a trade and retain his customers, each is entitled to the assurance that the other will close his business at a fixed time. Such a requirement not only provides for the rest and recreation of the employees, and cleaning and inspecting the shop, but it also serves the general welfare in regulating the time of conducting the business. *State v. Dolan*, 13 Idaho 693, 715, 92 P. 995, 14 L. R. A., N. S., 1259. A very interesting discussion of both sides of this question is to be found in *Patton v. City of Bellingham*, 179 Wash. 566, 38 P. 2d 364, 98 A. L. R. 1076.

In the *Perry* case, *supra*, the court, in interpreting the word "regulate" in respect to a city's police power, went so far as to hold that a city has a wide discretion even as to the individual to whom the license shall be granted and as to his place of business, notwithstanding the fact that the person seeking the license shows a compliance in all respects with the express requirements of the ordinance pursuant to which he makes application. The court says:

"Under its power to regulate, has it any discretion as to the person to whom licenses shall be granted, as to the place of business, or as to the number of licenses to be granted? The legislature could have prohibited the traffic, but it did not do so. However, it did give the city council the power to license, regulate, and tax it. The power is conferred on a deliberative body, and

its authority with respect to the subject is not limited to ministerial duties. The power of the legislaure was unlimited with respect to the business, and all of it except the power to prohibit, subject to a few restrictions named, was conferred by the charter upon the local legislature; and the will of such a body is expressed by a vote, and with the right to vote upon any question is implied the discretion to vote for or against. The business of retailing liquors may be regulated in various ways. To regulate is to control, restrict, and direct. To regulte the liquor traffic according to the purpose for which the power was granted would be to so govern it that it will be attended with good order, and, so far as may be, be consistent with the happiness and welfare of the people in the communities in which it is conducted. (*Italics added.*)

Provo City vs. Provo Meat and Packing Company, 165 Pac. 476, holds that where a power is conferred to regulate, there is included in the power to regulate the element of licensing. The court cites in this behalf 3 McQuillin, Municipal Corporations, paragraph 989:

“The prevailing rule is that under power to regulate, the municipal corporation may license and charge a reasonable fee, to cover the expense of regulation, especially concerning those occupations whrein regulation and supervision appear necessary or desirable for the public good.”

Larson et al vs. Salt Lake City, et al, 141 Pac. 98, holds that the authority to regulate rooming houses on the part of the ciy includes the authority to withhold a license because the city is presumed to have good cause for its action.

An interesting illustration of the status of the barber

shop, changing times, and liberal thinking forty years ago, is furnished by the case of *State vs. Sopher*, 71 Pac. 482, 25 Utah 318, decided in 1903. The legislature had enacted a general statute prohibiting the keeping open on Sunday of any place of business for the purpose of transacting business. The Barbers Union of the day was violently opposed to barber shops keeping open on Sunday, and one J. H. Rothwell, a member of the Union, entered a certain barber shop by the side door and asked to be shaved, which service he received and paid twenty-five cents therefor. The defendant was arrested, tried, and convicted. He appealed, contending that the general statute restrained him of his personal liberty and deprived him of his property without due process of the law. The decision therein quotes from *Ex-parte Newman*, 9 Cal. 518:

“In its enactment the legislature has given the sanction of law to a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience and sustained by science. There is no nation, possessing any degree of civilization, where the rule is not observed, either from the sanctions of the law or the sanctions of religion. This fact has not escaped the observation of men of science, and distinguished philosophers have not hesitated to pronounce the rule founded upon a law of our race.’ and again: ‘Labor is in a great degree dependent upon capital, and unless the exercise of the power which capital affords is restrained those who are obliged to labor will not possess

the freedom for rest which they would otherwise exercise. * * * The law steps in to restrain the power of capital. Its object is not to protect those who can rest at their pleasure, but to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. Its aim is to prevent the physical and moral debility which springs from uninterrupted labor, and in this aspect it is a benificent and merciful way.' " . . . It may be noted in this connection that Illinois has held invalid a statute enacting that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week (Ritchie vs. People, 155 Ill. 101, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315), in marked contrast to the decision of this court in sustaining an eight-hour law (State v. Holden, 14 Utah, 71, 46 Pac. 756, 37 L. R. A. 103; Holden v. Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780). Again, the general Sunday law of Illinois, above referred to, was so construed as to permit other business of a general nature to be transacted on the Sabbath. And so it was forcibly argued in the Elden Case that 'if the merchant, grocer, the butcher and druggist, and other trades and callings, are allowed to open their place of business and carry on their respective vocations during seven days of the week, upon what principle can it be that a person who may be engaged in the business of barbering may not do the same thing?' This court also quotes Mr. Tiedman as follows:

" 'If the law did not interfere, the feverish, intense desire to acquire wealth, so thoroughly a characteristic of the American nation, would ultimately prevent, not only the wage-earner, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instincts of self-preservation, by resting periodically from labor, even if the mad pursuit of wealth should not warp their judgment

and destroy this instinct. Remove the prohibition, and this wholesome sanitary regulation would cease to be observed."

This court, referring to the case of *State v. Petit*, 77 N. W. 225, 44 Law. Ed. 716, says:

"In the latter case the supreme court of the United States quoted with approval the following language from the Minnesota decision: 'Courts will take judicial notice of the fact that, in view of the custom to keep barber shops open in the evening as well as in the day, the employes in them work more, and during later hours, than those engaged in most occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were permitted to be kept open on Sunday the employes would ordinarily be deprived of rest during half that day. In view of all these facts, we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that, as a matter of law, keeping barber shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor they have left that question to be determined as one of fact.' . . . Whether the question be considered one of law or a conclusion of fact, we are of opinion that the act complained of was not an act of necessity. While shaving may be regarded as an act of personal cleanliness, desirable to be performed upon the first day as well as upon other days of the week, still the statute does not prohibit a man from shaving himself or from being shaved by his servant or valet. The statute is directed simply against the keeping open of a shop or place of business for the purpose of transacting business therein upon Sunday . . . All presumptions are in favor of the validity of a statute, and unless the courts can clearly say that

the legislature has erred the act should stand, and the prerogatives of the legislature not encroached upon. Courts may interpret, construe, declare, and apply the law, but may not usurp the functions of the lawmaking power by assuming to interfere with or control the legislative discretion. *We cannot say that the law in question is not adapted in a reasonable degree to promote the health, comfort, safety, or well-being of society.*" (Italics added.)

Feldman v. City, 20 Fed. Sup. 521, holds: That the City ordinance prescribing hours during which barber shops may be open for business cannot be held invalid as not a proper exercise of or not within City police powers without a reasonable doubt.

The head note in the case of State of Utah v. Holden, 14 Utah 71, says: "The Court will not hold that an act is not within the police power of the state unless it is so clearly without as to remove every reasonable doubt that it is."

In Kelly v. Judge, 238 Mich., 204, the court says: In case of doubt courts will not interfere to declare a regular enacted statute unconstitutional.

National Labor Relations Board v. Jones and Laughlin, 57 Sup. Ct. Rep. 615: "The cardinal principle of statutory constructions is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same. Federal Trade Commission v. American To-

bacco Company, 246 U. S. 298-307; Panama Railroad Company v. Johnson, 264 U. S. 375-90; Missouri Pacific Railroad Company v. Boone, 270 U. S. 466-472, Richmond Screw Anchor Company v. United States, 275 U. S. 331-346."

And as stated by the Supreme Court of the United States in the Sinking Fund cases, 99 U. S. 700-718: "Every possible presumption is in favor of the validity of a statute, (or ordinance) and this continues until the contrary is shown beyond a rational doubt . . . the safety of our institutions depends in no small degree on a strict observance of this salutary rule."

The burden here is unmistakably upon the defendant to show that the provisions of this ordinance are so clearly unreasonable and arbitrary as to amount to the depriving of defendant of his property without due process of law and unless there is clear and palpable abuse of police powers, a court will not substitute its judgment for legislative discretion. In this behalf see the much quoted and important case of *Nebbia v. New York*, 291 U. S. 502.

THE FACTS, CIRCUMSTANCES, AND EVIDENCE OF THE WITNESSES ARE ALMOST ONE HUNDRED PERCENT IN FAVOR OF ORDINANCE.

If beyond a peradventure of a doubt the question as to whether or not fixing the hours for barbers in Salt Lake City bears any real or substantial relation to public health, safety, comfort, and convenience is *an unalloyed question*

or fact as one of the trial judges held, we are unable, after a diligent search of the record on numerous occasions to find any fact substantial or otherwise that gives comfort to our adversaries' position. Indeed, the evidence and the all-important facts upon which this cause turns invariably ties up the direct relationship between the ordinance and the safety, convenience, comfort, and health of the city's inhabitants, to-wit:

C. H. Barton testified that in the past barber shops have opened at 8:00 o'clock and earlier in the morning and stayed open until 12:00 o'clock midnight and later at night; that such long shifts have reduced the vigilance and accuracy of the barber, have had a deteriorating effect on the barber, causing the barber to become careless and resorting to stimulants to keep him pepped up (Tr. 115, Ab. 12); that barber shop keepers and owners, endeavoring to operate their shops within reasonable hours, were required from the necessities of competing shops with unlimited barber shop hours to force their barbers to work unreasonably long hours, to the end that the barber working long hours would have little or no association with his family, little or no time for recreation, and seldom see his children of school age. (Tr. 116, Ab. 13); that alopecia, sycosis, impetigo, scrofula, exema, and other contagious and infectious diseases are brought into barber shops by customers; that a barber has to be alert and diligent to discover such diseases; that unless the barber is diligent and alert, such diseases spread from barber shops; that when a barber shaves a customer, he does not only take

off hair on the customer's face, but a portion of the skin is always taken off in addition by the sharp-edged razor; that this scraping of the skin by the razor where a customer has an infectious disease causes the germs from such customer to lodge on the barber's towels and brushes so that other customers are liable to be infected, unless the barber is careful (Tr. 118, Ab. 14).

Merwin Ellis testified that when he first went to Sugarhouse he had been in the habit of observing hours that were in practice in most of the shops then, which were 8:00 o'clock in the morning until 6:00 o'clock in the evening and on Saturdays, eight to eight. He went along that way until he found he was losing business to competitors taking advantage of those hours, so to save himself, he had to work unlimited hours (Tr. 102, Ab. 16).

E. B. Harrison testified that he had lived in Salt Lake City thirty years, was in charge of the enforcement of the laws pertaining to the Department of Registration and the sanitary requirements of the department; that he has been with such department since 1921 (Tr. 34, Ab. 17); that barber shops have improved a great deal in the last ten or fifteen years; that germs do not spread from one customer to another in a sanitary barber shop. If a customer has gonorrhea eye it is very easily spread in a barber shop. It has been my experience that impetigo, scrofula, exema, etc., spread from barber shops (Tr. 42, Ab. 18). Rigid inspection of barber shops will stop at least 90 per cent of the

various diseases that spread from barber shops (Tr. 43, Ab. 18). *There is no machinery set up with which to inspect barber shops after six o'clock in the afternoon or before eight o'clock in the morning.* It has never been practical to inspect barber shops after 6:00 o'clock at night. (Tr. 45, Ab. 19). The NRA had a great influence on barbers closing in 1933 and 1934. Before 1918 barber shops would open at 7:00 o'clock in the morning and would stay open as long as customers would come in until 12:00 o'clock midnight, or until the saloons closed (Tr. 47, Ab. 19). The barber who works from 7:00 o'clock in the morning until 9:00 o'clock at night becomes very fatigued, uninterested in his work or his service to his patrons, careless in his habits, leg and hand worn. It takes several hundred motions of the hand to cut a head of hair. A barber gets very fatigued. There was a great deal more disease spreading from barber shops during the time barber shops stayed open from 7:00 o'clock in the morning until 9:00 o'clock or 10:00 o'clock at night, than there is now (Tr. 49, Ab. 20). The single-chair shop can't compete with a multiple-chair shop running in relays. The single-chair shop, in order to hold business, has got to stay open the same number of hours as a multiple-chair shop. The tendency in sub-divisions of the city is to stay open until midnight if necessary. *There is no other way to compete with competition and to keep the other fellow from stealing the business* (Tr. 52, Ab. 21). Muscular effort, worry, and fatigue reduce the energy of the barber, and worry about getting business, out of the anxiety

of competition, is the worst (Tr. 61, Ab. 22). A tired barber would be more or less lax in discovering disease on a strange patient. There are 231 barber shops in Salt Lake City (Tr. 75, Ab. 22).

John H. Barton testified that he was a barber in the Walker Bank Building; that there were six barbers employed in his shop; that the barber shop is a union shop and is open from 8:00 o'clock in the morning until 6:00 o'clock at night and served business and professional men (Tr. 109, Ab. 23). We barbers are occasionally asked to serve customers suffering from contagious and infectious diseases and we refuse to work on them and refer them to a doctor (Tr. 110, Ab. 24).

E. J. Squires testified that he had been in the barbering business in Salt Lake City for 34 years; that the sanitary conditions in the old days were terrible; that in the old days we worked long hours, got worn out, and tired, and didn't think about infectious diseases (Tr. 124, Ab. 24); *that the history of barber shops in Salt Lake City shows that the reduction of working hours in barber shops and the increase in sanitation on the part of the barber go hand in hand*; that when a barber worked reasonable hours he felt better, had more respect, and felt like maintaining a more sanitary condition commensurate with his profession (Tr. 125, Ab. 25). When a barber operates a barber shop when other shops are not customarily open, *there is a tendency on the part of such barbers to save money by not using a sufficient amount of linen and sterilization*. This kind of barber does not com-

pete on a fair basis with the rest of the barbers (Tr. 126, Ab. 26).

F. J. Slade testified that he has been a barber for 17 years and works in the New Grand barber shop; that it had been his experience through observation in his own shop and in cooperation with other barbers that a barber *that worked over a specified length of time becomes jittery and reversant; that he has a tendency to become negligent* (Tr. 130, Ab. 26); *that the barber who works extra hours does not properly observe and comply with the health regulations, nor the proper care and degree of his work; that a barber, after seven or eight hours of work, needs a stimulant to carry on at the speed that must be maintained in a first-class barber shop; that alopecia is scattered and spread in barber shops; that the amount of strokes it takes to cut a man's hair and shave him is unbelievable; that the strain makes a barber jittery and unsteady* (Tr. 132-33, Ab. 27).

Robert L. Roberts testified that he has been a barber for 30 years; that a barber can't work efficiently over eight hours and efficiently observe the rules of sanitation; that long hours of work for a barber makes the barber hate to see customers come into the shop; that when other barber shops stay open later than another, *the one staying open takes the other man's business and the chiseling barber gets a lost customer and the only way for the other barber to get it back is to work long hours himself and compete against the chiseling barber* (Tr. 138, Ab. 28).

The above were all of the witnesses except the defendant and the absentee. (Tr. 139, Ab. 28).

In conclusion we submit that our adversaries will perhaps admit that there are approximately one hundred of the most prominent cities in the United States that have enacted and are enforcing city ordinances fixing the opening and closing hours of barber shops and there is not exactly a dearth of authority upon the subject and that in at least some instances the question has been stubbornly contested. *Patton v. Bellingham*, 98 A. L. R. 1077; *Louisiana v. Parker*, 82 So. 485; *Herron v. Arnold*, 82 Pac. 2d 997; *Jarvis v. State*, 83 Pac. 2d, 560.

If there are two sides to this question, it appears to us that defendant is compelled to take one or two positions—either he has got to contend that the ordinance is just plain unconstitutional as an infringement of the due process provision, etc., but this position has been made untenable by the United States Supreme Court in its *Soon Hing*, *Barbier*, and *Nebbia* cases, *supra*—or he has got to take the position that the city had no authority to enact the ordinance because there is no relationship between an over-worked, careless, chiseling barber menacing public health and the safety, welfare, morals, and convenience of the public. This latter position also has been made untenable by the cases above cited and especially by the recent decision of the Supreme Court of Idaho in the *Pearce* case, *supra*. The legislative enactments in Idaho are more favorable to adversary than

those in Utah. In Utah the authority to regulate barber shops is expressly included and implied in the grant of power to cities by the State legislature through the provisions of R. S. U. Sec. 15-8-84, which authorizes the respective cities to enforce the whole of chapter eight; and by the provisions of R. S. U. 15-8-39, cities are authorized to regulate barber shops; and by the provisions of R. S. U. 15-8-61, the cities may regulate and secure the health and prevent the spread of contagious diseases; hence it manifestly appears that the legislature did what it plainly intended to do, to-wit: Grant and include in the grant, over and above the usual ordinary and implied police power, the power and authority necessary to enact just such ordinance here presented whenever in the opinion of the city commission the occasion arose, and the occasion arose when the ordinance was enacted, and the ordinance itself *sets out the reason the city enacted it*, and perhaps it will be further admitted the city's officers are most likely to know what is required in this respect for the protection of the health and welfare of the city's inhabitants.

Salt Lake City has a valid ordinance enforcing the opening and closing hours of butcher shops, which is rigidly enforced. If it is impractical to inspect butcher shops after six o'clock at night, it seems it would be just as impractical to inspect barber shops after six o'clock at night; and just why are over-worked, tired and negligent barbers, after working long hours, any more alert in observing cleanliness and shop-sanitation than over-worked, tired and careless butchers after working long hours? Certainly barber shops are the subject

of regulation just the same as butcher shops are. Whether some of the old cases, twenty or fifty years ago, in the absence of legislative enactment and otherwise found otherwise occasionally, makes little difference because we know *now* that it *does make a difference* according to the facts presented in this case, and new and modern advancement, thinking and technic in the protection of public health and welfare.

We submit the validity of the ordinance is manifest.

All of which we respectfully submit.

E. R. CHRISTENSEN,
GERALD IRVINE,
A. PRATT KESSLER,
CLARENCE M. BECK,

Attorneys for Plaintiff.