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Salt Lake City v. Andrew Revene : Reply Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

SALT LAKE CITY,
A Municipal Corporation,

Appellant.

vs.

ANDREW REVNE,

Respondent.

} Case
No. 6330

RESPONDENT'S REPLY BRIEF

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Attorneys for Respondent.

FILED

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INTRODUCTION

The issue squarely put to this Court is whether-or-not:

1. The Municipal ordinance (in question) is within the express and implied power delegated to the City of Salt Lake.

2. Assuming that the ordinance comes within the delegated and implied power, is said ordinance constitutional?

It is counsels' position that the ordinance in question is not only outside the scope of the authority vested in Salt Lake City by the State Legislature of the

State of Utah, but that the ordinance in question is unconstitutional.

ARGUMENT

PROPOSITION 1. THE ORDINANCE IN QUESTION IS AN INVALID EXERCISE OF THE DELEGATED POWER TO LICENSE, TAX AND REGULATE BARBER SHOPS.

In the Revised Statutes of Utah, 1933, 15-8-39 it is stated that Municipalities may do as follows:

“They may *license, tax and regulate*, (naming many businesses and occupations) barber shops, beauty parlors, etc.”

In the same compiled statutes, 15-8-84 it is stated the municipalities may make the following rules:

“They 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 preserve the 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, etc.”

In 19 Ruling Case Law, Section 75 it is stated by the editors that:

“The legislature of a state, merely by establishing a municipal corporation does not delegate

to such corporation the right to exercise all the governmental powers of the State within its territorial limits, or even such powers as are commonly exercised by a municipal corporation of the same class. *It is well settled that a municipal corporation has only such powers as are clearly and unmistakably given to it by its charter or by other acts of the legislature, and consequently can exercise no powers not expressly granted to it except those which are necessary or incident to the powers expressly granted and those which are indispensable to the declared objects and powers of the corporation.*"

Professor McQuillan, at Section 368 of Vol. I, of his work, *Municipal Corporations*, says:

"The general, well-settled rule of construction is that a *doubtful power is a power denied*. Any ambiguity or doubt arising out of the terms employed in the grant of power must be *resolved against the corporation* and in favor of the public."

In *City of South Bend v. Chicago, South Bend & N. I. Ry. Company*, 179 Ind. 455; 101 N. E. 628, (1913), the court, at page 457 acknowledged the above rule of construction as follows:

"No incidental powers are implied *except those essential to the continued existence of the municipality* and to the accomplishment of the purposes of its creation, and *doubtful claims of authority are resolved against the corporation.*

In the case at bar the only power delegated by the state to the municipality of Salt Lake City is the power

to license, tax and regulate. It cannot be reasonably implied from that express delegation that the city should have the power to establish compulsory closing hours for barber-shops. And if it cannot be reasonably implied, certainly under the rule of strict construction it cannot be implied as a necessary incident to the express delegation to license, tax, and regulate.

In *State ex rel. Newman v. City of Laramie et al.* decided in 1929 by the Supreme Court of Wyoming; 275 Pac. 106, the Wyoming ordinance provided:

“No barber shop shall be opened for business earlier than 8 o'clock A. M. nor shall any barber shop close later than 6 o'clock P. M. throughout the year, excepting on Saturdays and days preceding the following legal holidays, etc.”

The Supreme court of Wyoming held that the ordinance was not a reasonable exercise of the delegated power given by the state to the municipality to license, regulate, and control barber shops, and therefore declared the provision to be void.

The Wyoming court during the course of its opinion made the following interesting quotation from *Freund on Police Power*:

“*Freund on Police Power*, Sec. 142 and Sec. 63 says that if a municipal ordinance, passed under authority conferred in general terms is found to be unreasonable, *the court will say that the legislature never intended to give authority to pass it. . . .* This is said to be particularly so in regard to ordinances having relation to the

liberty of the citizen or the rights of private property.”

The Wyoming court then distinguished the Falco case, which will be referred to in detail later, as not being in point, because in that case the New Jersey State legislature expressly authorized the municipalities to provide opening and closing hours for barber shops.

The Wyoming court finally concluded the opinion by stating:

“We are of the opinion that the provision complained of is *not reasonable exercise of the power to license, regulate, and control barber shops*. It therefore is unauthorized and void.”
(All judges concurred).

In *City of Alexandria v. Hall*, Sup. Ct. of Louisiana, 1930, 171 La. 595; 131 So. 722, the court held invalid and unconstitutional a municipal ordinance requiring barber shops to close at 6:30 P. M. except on legal holidays, and said:

“It is our conclusion, therefore, that section 4 of ordinance 286 is *not a reasonable exercise of the power of the City to regulate and control barber shops*, and that this section is unconstitutional, null and void as a whole.”

In *Knight, Chief of Police, v. Johns* decided by the Supreme Court of Miss., 137 So. 509, the court held invalid a municipal ordinance requiring barber shops to close at 6:30 on week days, and said:

“Municipalities have only such authority to adopt ordinances as is *expressly or impliedly*

given them by the state, and we are referred to no statute under which they are authorized to regulate hours of labor; but assuming, for the purpose of the argument, that they have authority to do so, this ordinance cannot be upheld thereunder. 'Into every power given a municipality to pass by-laws or ordinances there is an implied restriction that the ordinances shall be reasonable, consistent with general law, and not destructive of a lawful business' quoting Johnson v. Philadelphia, 94 Miss. 34; 47 So. 526.

PROPOSITION II. THE ORDINANCE REQUIRING BARBER SHOPS TO CLOSE AT A FIXED TIME IS UNCONSTITUTIONAL.

While some of the cases involving closing hours for barber shops have avoided the constitutional question by deciding that such regulation is invalid as an unauthorized exercise of the delegated police power, other cases have, even by way of dicta, as well as by direct decision, held such municipal ordinances unconstitutional on the grounds that they are unreasonable, discriminatory and in direct contravention of the due process clauses of the state and federal constitutions.

In Vol. VII of American Jurisprudence, 1937, at pages 617 and 618 the editors have this to say:

“The majority of cases which have considered the validity of ordinances containing provision requiring barber shops to be closed at a certain fixed time on secular days have reached the conclusion that such provision have no reasonable relation to the admittedly proper exercise of the police power in regulating the profes-

sion of barbering. Any such regulations depend for their validity upon the nature of the business sought to be regulated; that is, the nature of the business must be such that the public health, morals, safety, or general welfare is, or might be, affected by such business being permitted to remain open or continue after certain hours. With regard to barbershops, *such a regulation bears no reasonable relation to the public health or general welfare; nor can it be supported on the theory that it will aid the enforcement of proper inspection regulations.*

All the commentators and cases recognize one landmark case that has ruled contra to the above stated proposition. The case is *Falco v. Atlantic City*, decided in 1923, 99 N. J. L. 19; 122 Atl. 610. In that case the validity of an ordinance, similar to the one in question was sustained. The court took the view that barber shops afforded a fruitful opportunity for the spreading of certain form of contagious diseases, and as a result thereof were, from a health standpoint, subject to stringent regulations such as inspection, etc., and that to allow barber shops to remain open to the public at all hours of the night might well be regarded as rendering ready and adequate inspection inconvenient or difficult, or even impossible, and consequently detrimental to public health.

It is significant that the municipal ordinance involved in this case was expressly authorized by state legislation. Therefore the only question that could arise was the constitutionality of the ordinance.

The reasoning of this 1923 New Jersey case has been either ignored or repudiated by subsequent Cali-

fornia, Washington, Wyoming, Utah, Georgia, Louisiana, Illinois, and Mississippi cases, and by a decision decided by the Federal Courts.

The first case to be decided after the New Jersey case was the landmark case of *Chaires v. City of Atlanta*, decided by the Georgia Supreme Court in 1927; 164 Ga. 755; 139 S. E. 559. In that case the city of Atlanta passed an ordinance which, in the second section, contained the provision that "All barber shops in the City of Atlanta shall hereafter be closed during the week days at 7 o'clock." The court held that the ordinance was void on the ground that it was unreasonable, and said:

"We can reach no other conclusion than that Sec. 2 of the ordinance is not based upon a lawful classification, and that it is discriminatory."

And again the court said:

"Persons engaged in the operation of barber shops are carrying on a perfectly lawful business. In fact, the business may be regarded as indispensable in the present development of our civilization, if we are to regard the requirements of decency and cleanliness. There is ample evidence in the record to show that if the barber shops are closed at 7 o'clock in the evenings and not permitted to open until next morning, there will be a large and numerous class of citizens who cannot avail themselves of the service of barbers."

Two years later a similar ordinance presented it-

self to the Supreme Court of Wyoming in the case of *State ex rel. Newman v. City of Laramie et al.*, supra. While the Wyoming court based its decision on the grounds set out under Proposition 1, it was nevertheless anxious by way of dicta to give its opinion on the Constitutional question, and to repudiate the reasoning of the New Jersey case. The court had the following to say:

“Unless the closing regulation in question bears a real and substantial relation to the purpose of protecting the public from the spread of disease, it stands on the same footing as any similar restriction on the right of a citizen to engage in a harmless and useful occupation.

The Wyoming court then quoted from *State v. Ray*, 131 N. C. 814; 42 S. E. 960, where the defendant was charged with violation of an ordinance requiring the closing of stores at 7:30 P. M. The court said:

“It must be admitted that the enforcement of this ordinance would be to deprive the defendant of his natural right—would be to interfere with the free use and enjoyment of his property, used in such a way as not to interfere with the rights of others. It is not shown, nor is it suggested that defendant’s keeping his store open after 7:30 interfered with the rights of anyone else. It was said that the other merchants were willing to close their stores at 7:30 but the defendant was not, and the ordinance was passed to compel him to do so, for the reason that if he kept open the others would be compelled to do so, or to give the defendant the benefit of the trade of the town after that time. But did this give the commissioners the right to close the defendant’s store?

It would seem that no legislative power exists under our form of government and our ideas of personal liberty, as to allow such interference with one's rights of ownership and dominion over his own property, except such interference be exercised for the protection and benefit of the public. When such interference is authorized, it is under the doctrine of eminent domain, but it is said to be under the police power of the government. The attempted exercise of the power in this instance is clearly not under the doctrine of eminent domain, but it is said to be under the police power of the government. If the state could exercise such power (and we do not say it could) can a municipal corporation do so without express authority from the state.

The Wyoming court then quoted from *Saville v. Corless*, 46 Utah 495, 151 Pac. 51 where the Utah Supreme Court considered a state law requiring commercial and mercantile houses to close at 6 P. M. The court found several objections to the state law, but on the question of Constitutionality said, as quoted by the Wyoming Court:

“We think it also offends against constitutional right to enjoy, acquire, and possess property, the most valuable of which is that of alienation—the right to vend and sell. There are things the sale of which may be restricted, regulated and controlled. But such legal interference must rest on the police power of the state to promote or preserve public health, public morals, public safety, public convenience, and general welfare. The act here has no such purpose, and in no sense tends to promote or preserve public health, morals, peace, order, safety,

convenience, comfort or welfare. It is but an arbitrary and an unwarranted interference with a merchant's business. One or a number of merchants may desire to close their stores at 6 o'clock. They may do that. But they, by legislation, cannot compel every other merchant to close at the same hour. They can run their own business, but not their neighbor's."

After quoting the Utah case the Wyoming Supreme Court distinguished and criticized the New Jersey case, *supra* and said:

"In the case relied on (Falco case) the statute plainly granted to the city the right to fix hours of closing. The court thought it probable that this had been done in order to permit the city to make ready and adequate inspections that might otherwise be inconvenient, difficult, or even impossible. In the case at bar, the city's power to fix closing hours does not arise from such a specific grant, and must exist, if at all, as an incident to the power to regulate. The power has been exercised by prescribing sanitary regulations, and by providing for inspections to see that regulations are followed. Such provisions are conceded to be reasonable. There is nothing in the statute to show that the Legislature thought the municipal corporation would need to close the shops in order more readily to inspect them, nor is there anything on the face of the ordinance to show that the closing of shops at 6 o'clock in the evening was necessary to facilitate inspection. There is nothing in the agreed facts to show when or how inspections are usually made. So far as we know, a barber shop in operation after 6 o'clock can be as readily and adequately inspected as one in operation before that hour.

The possible suggested difficulty is that inspectors cannot be on duty at all hours of the night, without placing too great a burden on the municipality. Perhaps, to those who are familiar with the times and methods of inspecting barber shops, this reason would seem absurd. If, for instance, in the administration of such an ordinance an inspection is made of each shop once a month, once a week, or even once each day, there would seem to be no substantial reason for the claim that the closing of the shops at 6 in the evening was at all necessary to facilitate inspection. In the absence of facts, we may not be justified in any definite assumption as to the frequency and nature of the inspections. We cannot, however, refrain from saying that the record on appeal shows that, on an application for stay of execution, the relator presented to the district court his affidavit, not contradicted, in which he states that, so far as he knows, the city health officer has never inspected his shop from May, 1927, when the ordinance was passed, to November, 1927, when the affidavit was made.

There is hardly any business that cannot to some extent be regulated in the interest of the public health or safety. Freund Sec. 143. Laws prescribing sanitary regulations, requiring the maintenance of safety devices and the labeling of compounds, abound in the statutes of this and every other state. Many of them have been in force for years. Most of them provide for inspections, but it is only in the few recent cases that we have cited that it has been supposed that the right to inspect includes the right to restrict the operation of the business by fixing closing hours. It will readily be seen that a principle

that would permit the closing of barber shops as a reasonable exercise of the power to inspect would permit a like restriction in regard to many of the other businesses which are regulated under the police power.

Following the Wyoming case appears a decision decided by the Supreme Court of Louisiana on Dec. 1, 1930. There an ordinance was involved which required barber shops to close at 6:30 P. M. except on days preceding legal holidays. The court in holding the ordinance unconstitutional said: *City of Alexandria v. Hall*, 171 La. 595; 131 So. 722:

“The city of Alexandria has attempted to maintain the constitutionality of the ordinance by the introduction of medical experts who have testified that the longer the hours of work are the more run down becomes the system of the barber, and the more susceptible he is to communicable diseases, and that thereby the public health may become endangered.

In our opinion the public health is protected by the provisions of the ordinance itself requiring the inspection of barbershops, sterilization of instruments, and examination of all barbers suspected of having communicable diseases.

And again the court said:

“A minority of 20% of the barbers in the city of Alexandria are opposed to the ordinance in question. The clear purpose of the ordinance is to make all barbers close their shops at the same time. No thought of the health of the community, in our opinion, was in the minds of the barbers or of the City Council when Sec. 4

was written into the ordinance closing all the barber shops during the week days at 6:30 P. M., except on Saturdays when they must close at 9:00 o'clock P. M. Besides, adequate health provisions are taken care of in the uncontested provisions of the ordinance.

In 1933 a case involving compulsory closing hours for barber shops appeared in the Federal Courts. The case was *McDermott v. City of Seattle*, 4 Fed. Supp. 855. In that case an ordinance of the City of Seattle made it unlawful to keep open a barber shop except from 6 A. M. to 6 P. M. on week days, and from 6 A. M. to 7 P. M. on days preceding holidays. The Federal court ruled the ordinance unconstitutional as taking property without due process of law, and enjoined the City from enforcing it. The court said:

“The ordinance takes from the plaintiff trade for assumed public benefit, five hours, 6 P. M. to 11 P. M., every day except the days before Sundays and holidays when 4 hours are taken—7 to 11 P. M.—approximately 1-3 of his good will (property) without compensation or due process. This the city has no power to do.”

In *Patton v. City of Bellingham et al*, decided by the Supreme Court of Washington one year after the Federal case on Dec. 6, 1934, 38 Pac. (2nd) 365 the court held invalid an ordinance prescribing hours for opening and closing barber shops, on the ground that it was unreasonable and arbitrary, and consequently void. The court said:

“Confining ourselves, then, to the ordinance and its effect, we have no hesitancy in saying,

first, that the provisions found therein, with reference to the inspection of barber shops, constitute a valid exercise of the city's police power, and, as such, were reasonable and proper."

The question then presents itself here whether the provision with reference to the time of opening and closing barber shops is reasonable and proper for the protection of the health and general welfare of the public, or whether it is unreasonable and arbitrary and an unlawful interference with the rights of the individual.

Whether the facts of a particular case warrant the assertion of police power is a judicial question to be resolved by the courts. *Bowes v. Aberdeen*, 58 Wash. 535, 109 P. 369; *Freund, Police Power*, Sec. 142; 2 *Dillon on Municipal Corporations* (2nd Ed.) Sec. 599.

"While the interest of the public may be likened unto an irresistible force which compels where it requires, it nevertheless must, under constitutional provisions, both federal and state, respect the rights of the individual. While the latter may not occupy the fixity of an immovable object, they nevertheless have the protection and sanction of the fundamental law of the land, and they recede before no less a force than that of public necessity.

To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members." (Quoting *Adkins v. Children's Hospital*, 261 U. S. 525, 43 S. Ct. 394).

The occupation of barbering is a lawful busi-

ness, and, so far from being an obnoxious one, it is now considered well-nigh indispensable. It may be conceded, as we have already conceded, that its relation to the public is such as the public may be protected against the spread of communicable diseases and unsanitary practices. In so far as the ordinance seeks to require that such shops shall be operated in a clean and sanitary manner, and by clean and competent barbers, it is a wholesome measure and a valid exercise of the police power. But in our opinion, the avowed object of the ordinance bears no real or substantial relation to the reasonable protection of the public. It belongs, rather, in the category of unreasonable restrictions upon the right of a citizen to engage in a useful and lawful calling and to acquire and possess property and to so use it as will not interfere with the rights of others. The ordinance seeks not merely to regulate a business, but to dictate its operation.

“The right to labor or earn one’s living in any legitimate field of industry or business is a right of property, and any unlawful or unreasonable interference with or abridgement of such right is an invasion thereof, and a restriction of the liberty of the citizen as guaranteed by the Constitution.” (Quoting *Yee Gee v. City and County of San Francisco*, D. C. 235 Fed. 757, 759.)

“It is contended by respondents that it is necessary to limit the hours that a barber may labor, in order to prevent fatigue with its consequent hazards to the general public. It will be observed that the ordinance does not by its terms limit the hours of labor at all, but merely attempts to limit the time within which a shop may be kept open. If a shop remained open twenty-

four hours of the day, working two shifts of six hours each, there would be no violation of any regulation as to the hours of labor. It may be true, as suggested in the testimony of some of the witnesses that the enforcement of the ordinance would serve to deflect a portion of appellant's business to other shops of the city, and thus secure a fairer division. But that result, even though it should follow, is, in our opinion, no valid reason for compulsory interference with the lawful business of the individual. If the principle thus contended for is upheld, then the city council could limit the opening and closing of shops to any period that it saw fit, with the view of equalizing the incomes of all. Such legislation, if upheld, might be the first installment of a plan or system by which all shops would be required to pool their revenues for equal division. In our opinion, the provisions of the ordinance requiring the shops to close at specified hours bear no reasonable relation to the public health or general welfare. The evidence in the case, upon which findings of the court are based, rests upon conjecture and not upon anything of a substantial nature.

“It is suggested by respondents in their brief that the closing of the shops at an early hour would facilitate inspection by the authorities and members of the board of inspection. (Suggested by the reasoning in the Falco case, *supra*). But certainly ample opportunity now exists for reasonable inspection, and certainly the situation does not call for an absolute closing of the shops in order that inspectors may go upon the premises; otherwise the right of inspection would not be an incident of regulation, but would be a lever by means of which the business would be largely controlled.”

“The following cases have been called to our attention, involving ordinances containing provisions practically identical with those with which we are here concerned. *Falco v. Atlantic City*, *State v. City of Laramie*, *City of Alexandria v. Hall*, *Knight v. Johns*, *McDermott v. City of Seattle*. (All cited within this brief). The first of these cases supports the contention of the respondents. The remaining five hold the ordinances in question either unconstitutional or else unreasonable and void. The cases differ somewhat in their reasoning and in the grounds on which their conclusions are rested. All, HOWEVER, reach the same result. We have hereinabove adopted some of the statements made in several of them, and therefore will not take further space in analyzing or quoting from them.”

“We are of the view that the provisions of the ordinance relating to the hours of opening and closing barber shops are unreasonable and arbitrary, and consequently void. The decree of the trial court is therefore reversed, with direction to enter in its place a decree permanently enjoining the enforcement of the ordinance to the extent last mentioned.”

After the Washington case appears a line of California cases, all decided in the years 1935 and 1936. The first of these, decided in 1935 by the Supreme Court of California clearly shows the disposition of the California court on this identical question. The case is *Ganley v. Claeys et al*, Sup. Ct. of California, 1935, 40 Pac. (2nd) 817. There the court held that an ordinance regulating barber shops, and providing that said barber shops must be closed from 6:30 P. M. until 8 A. M. of

the following morning, except on Saturdays and days preceding specified holidays was void, having no reasonable relation to public health, which was the avowed purpose assigned for its adoption.

The court first cited from an earlier California case, *Ex Parte Jentzsch*, Sup. Ct. of Cal, 1896; 112 Cal. 468; 44 Pac. 803, where the court had held a barber statute which required barber shops to close after 12:00 o'clock on legal holidays unconstitutional because it was special, unjust, and unreasonable, working an invasion of individual liberty, since it was based upon no distinction to justify singling out that class of laborers.

After citing the *Jentzsch* case with approval the court proceeded to say:

“It is asserted by appellants, however, that the present case is different from the one there considered, because since that time, the state, by the California Barber Law has acted to regulate the business of barbering and has defined therein unsanitary practices and provided for the appointment by the board of barbers of such inspectors as are necessary to carry out the provisions of the act. . . . It is said that the inspectors are only on duty from 9 a. m. until 5 P. M. and that 90 per cent of the complaints from the public concern violations occurring late in the evening or on Sundays or holidays; hence the ordinance is a health measure.

“However, a reading of the barber law will convince the most skeptical that the state has provided a complete plan or method for the regulation of the business and to prevent anyone

from engaging therein who does not conform to the standards therein announced.”

It should be pointed out at this point that the legislature of the State of Utah has provided similar sanitary measures for barber shops to those provided by the California legislature.

In the Revised Statutes of Utah, 1933, under the heading **SANITARY REGULATION OF CERTAIN BUSINESSES**, 35-1-12, it is provided:

“The State Board of Health may adopt reasonable rules and regulations prescribing sanitary requirements for medical practitioners, dentists, pharmacists, barber shops, barber schools, cosmeticians and beauty shops, and cause such rules and regulations to be printed in suitable form and transmit a copy thereof to each registered medical practitioner, dentist, pharmacist, cosmetician, and proprietor or manager of a barber shop, barber school or beauty shop.”

SANITATION IN CERTAIN PLACES OF BUSINESS, 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, laboratories, appliances, line and supplies of all medical practitioners, pharmacists, dentists, barber shops, barber schools, cosmeticians and beauty shops.

UNPROFESSIONAL CONDUCT DEFINED, 79-4-18:

“The department . . . The words “unprofessional conduct” as relating to barbers, students, apprentices and teachers are hereby defined to include:

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

(8) Conducting a school in an insanitary manner or violating any rule of the department regulating the conduct of barber schools.

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

(7) Violating any of the provisions of this chapter, or any rule of the state board of health prescribing sanitary requirements of barber shops or schools.

It appears to counsel that it should be clear to the court from the above statutory provisions that the health of the citizens of the state is protected by sanitary regulations of barber shops by state legislation, and in the proper and accepted manner, and that a municipal ordinance providing for the compulsory closing hours, under the excuse that it is necessary for the health of the community is entirely unwarranted, and an obvious misuse of the delegated police power for unconstitutional union legislation.

ANALYSIS OF APPELLANT'S CASES AND EVIDENCE

Before discussing the barber cases cited by appellant it seems sensible to address the court's attention once again to the basic inquiry in this case. It is:

Does the City Commission have the power to pass the ordinance in question? If the Commission has such power it must be one of three types. (1) A power that could be called inherent. (2) A power expressly given to the City by a higher authority. (3) A power that can be implied from an express power given. These categories are sufficiently inclusive. Yet the pretended power of the City Commission to pass an ordinance requiring Barber Shops to close at a specific time cannot be established under any of these headings. Counsel, to clarify his position, will consider each in turn and show that the City has presented neither reason nor authority which will sustain this court in establishing the validity of this ordinance.

(1) The power is not inherent in the City to pass this type of ordinance: It should not be necessary to go to any great length to demonstrate that the commission has no inherent power to pass the ordinance. The simple and well established fact is that no inherent powers attach to a municipality created by the legislature, unless that municipality has a home rule charter under State Constitutional provisions which provide for such charters.

In the City of Chicago vs. M. & M. Hotel Co., 93 N. E. 753, the court expresses very well the signifi-

cance of the relationship between the State and Municipality as follows:

“The state legislature has inherent power to pass any law it sees fit, unless it contravenes some provision of the State or Federal Constitutions. The legislature may delegate all or a part of its power to municipalities created by the legislature. Among the essential powers of the government are the taxing power, the police power, and the power of eminent domain. These powers belong to the State. They are essential to the existence of government. The State cannot divest itself of these powers and retain its sovereignty. Stripped of these great powers the state would become subordinate to the municipality or corporate entity in which such powers were vested. The mere delegation of any of the powers does not divest the state of its sovereign right to exercise them for itself or to take them away from municipalities at its pleasure. Counties, townships, school districts, cities, villages and other municipal and quasi-municipal corporations are created under the authority of the legislature. These, and all other local municipalities which are authorized by the legislature, derive their existence and all their powers from the legislature of the State creating them. There is therefore no such thing as an inherent power in any municipality which is created by legislative enactment.”

This Illinois court is simply stating the commonly accepted view, and one to which counsel for the City will no doubt accede.

While municipalities operating under Home Rule Charters do not, strictly speaking, have inherent pow-

ers, they do have plenary powers in local affairs. Inasmuch as the City relies for authority on cases taken from home rule cities counsel would like, briefly, to point out the significant distinction that exists between a home rule city, and a municipality of enumerated delegated powers, as exists in our own community and State. In 43 Corpus Juris, page 275, Sec. 294, under the heading: Home Rule Provisions, the following may be noted:

“In many jurisdictions the late tendency is to secure to municipal communities freedom of action in matters pertaining to local affairs. Numerous constitutional provisions have been enacted to safeguard municipal corporations from interference by the State legislature. . . . The ordinary effect of these constitutional provisions under consideration is to empower the municipal corporation to incorporate in its charter powers and functions that are municipal or local in character. In so far as ordinances or regulations are enacted in the exercise of that power, they supersede state laws in conflict therewith, and in regard to such powers and functions the corporation is free from the control or supervision of the legislature.

Obviously, such cities have a great deal more freedom than the ordinary city of enumerated powers. And of course the rule of construction employed in construing municipal legislation is entirely different from that properly employed in the case at bar. In a Home Rule City, once the problem of whether or not the ordinance is local or not is decided, the only question that can arise is whether or not the ordinance is constitutional. And of course, the proper rule of construction in deter-

mining constitutionality is the liberal rule, one which favors validity, and determines all doubts in favor of the enactment. That is probably why the Ohio cases cited by the appellant in its brief talk only of constitutionality, and refrain from mentioning the strict delegated powers.

Ohio, it should be pointed out, has a special constitutional provision providing for Home Rule Cities, as set out in the cases cited. These cases are only authority for the proposition that the ordinance in question in this case is constitutional. They in no manner whatsoever can have any bearing on the validity of the ordinance passed by the City of Salt Lake as construed under the theory of delegated powers. And that question, counsel frankly feels, is the vital and crucial problem that must be decided by this court.

(2) The power to provide compulsory closing hours for barber shops is not expressly delegated to the municipality.

The court need only consider the Revised Statutes of the State of Utah, 1933, Sec. 15-8-9, wherein the power given to the City is expressly stated as follows:

“They (cities) may license, tax and regulate, etc. (listing a large number of business including barber shops)”.

It is perfectly clear that this statutory provision does not expressly delegate to the city power to compel barber shops to close at a specified hour.

It should be noted at this point that one of the cases relied upon by the city is a jurisdiction where the State Legislature has in positive and clear terms delegated to the City express power to regulate the closing hours of barber shops. The case is that of *Falco v. Atlantic City*, already cited by both plaintiff and defendant. In that case the Legislature provided that cities were allowed "to pass, enforce, alter or repeal ordinances, regulate the opening and closing of barber shops on Sunday and holidays, also week days".

The Idaho Supreme Court in the case of *Pearce v. Moffatt*, 92 P. 2nd 146, cited by appellant, decided that an ordinance passed by the City of Boise regulating closing hours for barber shops was constitutional.

The case is very interesting because it contains a rather complete review of all prior decisions deciding the question of the constitutionality of similar ordinances and statutes. It is of limited applicability, however, as the decision does not consider what counsel and Judge Schiller felt was the controlling question—that of *ultra vires* acts of municipal corporations.

It appears that the State of Idaho—unlike the State of Utah—has a legislative enactment providing for compulsory closing hours for barber shops. It then appears that the City of Boise passed an ordinance consistent with the state legislation, providing for compulsory closing hours. The District Court in Boise found the ordinance and statute unconstitutional and the plaintiff *Pearce* then brought this suit to enjoin prosecution under the statute and ordinance.

The court in a 2-3 divided opinion held that the ordinance was constitutional and the statute was unconstitutional. All of the argument was limited to that one question. Nothing was said about the question of the theory of delegated powers and ultra vires acts of municipalities. This is understandable in view of the state legislation which expressly authorizes such regulation, and in view of the manner in which the question was presented to the court. The lower court had held both the ordinance and statute unconstitutional, and the appeal went to that question solely. Of course, if there is a statute expressly authorizing such regulation then the only question that can arise is whether such regulation is constitutional. But query, when the Idaho Supreme Court held the statute unconstitutional and the ordinance constitutional didn't the question of ultra vires acts of municipalities presents itself, and shouldn't the court have addressed itself to that problem on its own initiative? That the court omitted to do so is clear. All argument was confined to the question of constitutionality. The decision is also not very clear on why the statute was unconstitutional and why the ordinance was constitutional, unless it was because the statute was discriminatory in confining the regulation of hours to cities of the first and second class. Otherwise the constitutional question is identical in both cases.

Of course, the two dissenting judges felt that the ordinance and the legislation were unreasonable exercises of the police power and consequently unconsti-

tutional enactments. This court will find their opinions interesting, and counsel feels, should see in them a much sounder line of reasoning than that followed by the majority opinion. However, from the beginning of this litigation counsel has felt that the real problem which any competent court must decide is simply this: Does the general authorization given by the state of Utah to Salt Lake City to license, tax, and regulate barber shops, along with most every other business, give Salt Lake City the implied power to impose upon neighborhood and down town barber shops alike a compulsory closing hour (not a minimum hour day) beyond which they cannot conduct their private business. The Idaho decision gives no assistance whatsoever on this proposition. It simply indicates that on the constitutional question, the court could not agree. Certainly, in the face of such serious constitutional problems, this court cannot say that the State of Utah intended Salt Lake City have implied power to do that about which there is serious doubt that the State of Utah could itself do.

Counsel has already pointed out at some length in this Brief that the rule of construction as it relates to implied powers of municipalities is a strict rule, one that is diametrically opposed to the rule indulged in favor of constitutionality. Counsel for the City has not cited a single case wherein the Court has implied powers in a case analagous to the one at bar. On the other hand, the Wyoming case, *State ex rel. Newman v. City of Laramie et al*, quoted by defendant in his prior Brief, is directly in point. In that case, the State leg-

islation provided that the municipalities could license, regulate and control barber shops. This delegation of power is, if anything, more broad and liberal than that provided by the Legislature of the State of Utah. The Wyoming Supreme Court had no hesitation in determining that the power to close barber shops at a specified hour could not be implied from the grant of power provided.

Counsel does not desire to comment on the evidence produced in court by the City in its endeavor to support the proposition that the municipal ordinance in question is necessary for the health, peace and safety of the community. If anything, the redundant testimony offered simply showed an over-zealous attempt on the part of the Barber Union to prop up a flimsy piece of class sponsored legislation. This evidence alone shows most conclusively that the ordinance is arbitrary and special, and is directed by Union forces to only one of the many businesses which the municipality is given power to regulate. The Judge before whom this evidence was heard had the following comment to make:

*DECISION OF THE COURT CASE NO. 10743
AS SHOWN BY THE RECORD, 7TH
PARAGRAPH.*

“This case, at the court’s insistence, was tried on its merits. A mass of testimony was introduced by Salt Lake City for the purpose of showing that an ordinance regulating the hours of business of barber shops was necessary and incident to the effective regulation of barber

shops and in any event that the ordinance bore a real relationship to the preservation of health and safety in the community. Without reviewing the city's evidence in detail, suffice it to say that it was not convincing to the Court. It disclosed no necessary or even incidental relationships between the power to regulate and the fixing of hours of business nor was any realistic connection shown between the health and safety of the inhabitants of Salt Lake City and the requirement that barber shops remain open only during designated hours."

If we have arrived at a stage in our society where compulsory closing hours are desirable, the State Legislature, which is the policy forming body of our State and Government should formulate a general law. Even then our courts would have the grave question of constitutionality to determine. Certainly the City Commission, urged by Union leaders, should not be allowed under our theory of municipal government to enact a special law on a troublesome legal and social question.

Respectfully submitted,

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