

1948

I. R. Stringham, et al. v. Salt Lake City : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT of the State of Utah

I. R. STRINGHAM, J. S. SMITH, J. D. GARDNER, CENTRAL LAND COMPANY, a corporation, UTAH MOTOR PARK, a corporation, IVA PARKIN, E. F. ZEYER, L. O. HUNTER, ART J. CARTER, FRED MUSE, IVY RAE PITMAN, E. A. CHAMBERLIN, FRANK B. BOWERS, MRS. DEAN R. DAYNES, MRS. HUGH W. LAW, KENNETH E. SMITH, GLEN C. BILLS, ALBERT P. HOLT, LEWIS HUMPHRIES, GOMER O. THOMAS, UTAH CREDIT CO., a corporation, CAPITOL CHEVROLET CO., a corporation, HOME ACCEPTANCE CORPORATION, a corporation, and JOE JOHNSON,

Appellants,

vs.

SALT LAKE CITY, a municipal corporation,

Respondent.

RESPONDENT'S BRIEF

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Appellants,

vs.

SALT LAKE CITY, a municipal corporation,

Respondent.

RESPONDENT'S BRIEF

STATEMENT OF FACTS

This appeal is taken from an order of the Honorable A. H. Ellett, one of the Judges of the Third Judicial Dis-

trict Court of the State of Utah, sustaining respondent's demurrer to and dismissing appellants' complaint as amended and as is set forth in appellants' brief on pages 3 to 14, inclusive.

Appellants' complaint sought to restrain respondent from enforcing an order issued by the Board of Commissioners of Salt Lake City, respondent herein, pursuant to the provisions and authority of Section 5720 of the Revised Ordinances of Salt Lake City, Utah, 1944, requiring appellants and others similarly situated to remove certain street signs as described in said complaint and which Section 5720 of the Revised Ordinances of Salt Lake City, Utah, 1944, is set forth in full on pages 14, 15 and 16 of appellants' brief.

Appellants contend that the court erred in sustaining the demurrer to and ordering the dismissal of their complaint for the reason that Section 5720 of the Revised Ordinances of Salt Lake City, Utah, 1944, is void because it contains no standard or rule to guide the commissioners of Salt Lake City or the public in the matter of removal of signs and for the further reason that the order given was arbitrary, capricious and void because not supported by any reason, logic, lawful classification or legitimate objection and under this last reason appellants also contend that no valid order was given to appellants by respondent to remove said signs.

RESPONDENT'S ARGUMENT

It is respondent's position that appellants did not

set forth facts sufficient to warrant the trial court in granting the relief therein prayed for and that the trial court was justified in entering its order sustaining respondent's demurrer and ordering the dismissal of appellants' complaint upon appellants' failure and refusal to amend their said complaint or otherwise plead in said action.

Respondent in advancing its position in the foregoing matter and in answer to appellants' brief heretofore filed with your Honorable Court herein sets forth its argument under six points, each of which will be discussed separately as follows:

POINTS ARGUED

I. THE CITY HAS SUFFICIENT POWER TO REGULATE OR PREVENT THE INSTALLATION, MAINTENANCE OR REMOVAL OF SIGNS LOCATED IN PUBLIC STREETS.

II. THE PERMIT AND LICENSE GIVEN BY THE CITY TO INSTALL AND MAINTAIN SIGNS IN ITS STREETS IS AT MOST A TEMPORARY PERMIT AND MAY BE REVOKED AT THE WILL OF THE CITY COMMISSION.

III. THE COURT CANNOT PASS UPON THE WISDOM OF THE CITY COMMISSIONERS IN MAKING AND ENTERING THEIR ORDER OF REMOVAL OF SIGNS IN THE STREETS OF SALT LAKE CITY.

IV. PROPER NOTICE OF THE ORDER OF REMOVAL WAS GIVEN TO EACH APPELLANT.

V. THE ORDER OF REMOVAL OF SIGNS WAS GIVEN TO EACH HOLDER OF A PERMIT OR LICENSE SIMILARLY SITUATED OR LOCATED IN SALT LAKE CITY.

VI. UNDER CITY'S DELEGATED POWERS IT IS NOT REQUIRED THAT SECTION 5720 OF THE REVISED ORDINANCES OF SALT LAKE CITY, UTAH, 1944, CONTAIN STANDARDS OR RULES TO GUIDE THE COMMISSIONERS OF SALT LAKE CITY OR PUBLIC IN THE MATTER OF THE REMOVAL OF LICENSED SIGNS.

ARGUMENT

I. THE CITY HAS SUFFICIENT POWER TO REGULATE OR PREVENT THE INSTALLATION, MAINTENANCE OR REMOVAL OF SIGNS LOCATED IN PUBLIC STREETS.

It is conceded by the city that it has no greater powers than those expressly granted to it by the State Legislature.

Wadsworth v. Santaquin City, 83 Utah 311, 28 P. 2d 161.

Salt Lake City vs. Sutter, 61 Utah 533, 216 P. 234.

The Utah State Legislature has seen fit to delegate to the cities located within the State of Utah wide general powers in the control of its streets. Those sections

in the State statutes which will be hereinafter specifically referred to are set forth as follows :

“15-8-26. SIGNS AND ADVERTISING MATTER. They may regulate or prevent the use of streets, sidewalks, public buildings and grounds for signs, signposts, awnings, horse troughs or racks, or for posting handbills or advertisements.”

“15-8-23. CLEANING PROPERTY, STREETS AND SIDEWALKS. They may regulate and control the use of sidewalks and all structures thereunder or thereover; and they may require the owner or occupant, or the agent of any owner or occupant, of property to remove all weeds and noxious vegetation from such property, and in front thereof to the curb line of the street, and to keep the sidewalks in front of such property free from litter, snow, ice and obstructions.”

“15-8-11. STREETS—ENCROACHMENTS, LIGHTING, SPRINKLING, CLEANING. They may regulate the use of streets, alleys, avenues, sidewalks, crosswalks, parks and public grounds, prevent and remove obstructions and encroachments thereon, and provide for the lighting, sprinkling and cleaning of the same.”

“15-8-10. TREES. They may plant, or direct and regulate the planting of, ornamental shade trees in streets, parks and public grounds.”

“15-8-84. ORDINANCES—PUNISHMENT. 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; provided, that the punishment of any offense shall be by fine in any sum less than \$300 or by imprisonment not to exceed six months, or by both such fine and imprisonment."

It should be noted that in Sections 15-8-26 and 15-8-11 the city's powers are to regulate and prevent while in Sections 15-8-10 and 15-8-23, they are merely to regulate. Section 15-8-84 delegates to cities of Utah general police powers which permit and empower cities to enact ordinances 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. This section will be more fully referred to under the argument of points II and VI of this brief.

II. THE PERMIT AND LICENSE GIVEN BY THE CITY TO INSTALL AND MAINTAIN SIGNS IN ITS STREETS IS AT MOST A TEMPORARY PERMIT AND MAY BE REVOKED AT THE WILL OF THE CITY COMMISSION.

The cases generally hold that an individual can acquire no property right in a public street and that any private use of a public street either by a permit,

adverse use, or otherwise, and for no matter how long a period of time, is merely a permissive right and can be terminated and prevented at the will of the governing body. The power for such action is vested in such governing body by either a direct grant of power or by the police power as is vested in them.

The case of Palace Garage, et. al., vs. Oklahoma City, an Oklahoma case reported in 268 Pac. at page 240, is a leading case frequently cited to sustain the city's right under its police powers to enforce an ordinance requiring the removal of obstructions from a public street. The matter was an appeal from the trial court's order sustaining a demurrer to appellant's petition, wherein it was requested that the city be enjoined from enforcing an ordinance requiring the removal of service stations located between the sidewalk and the curb. The State law in Oklahoma granted to cities the power to prohibit and prevent an encroachment into and upon the sidewalks and streets. Appellant contended it had certain rights in the parking which was admitted, but the court held that the passage of the ordinance requiring the removal was a valid exercise of the police power of the city and stated as follows:

“In exercising the power conferred upon it under the general welfare clause of the statute, the city council has broad discretion to determine what is necessary for the public welfare, safety, comfort, and convenience of the inhabitants of the city. The city council likewise has a similar discretion in determining what character of structure may be erected and maintained upon, over, or under the streets, alleys, and sidewalks of the

city, so long as such structure does not constitute per se a common nuisance. 'A purpresture is an encroachment upon the street, which the municipality may or may not tolerate at its option, if the same be not also a public nuisance.' *Ruffner v. Phelps*, 65 Ark. 412, 46 S. W. 728; *Owens & Scott v. Town of Atkins* (163 Ark. 82), 259 S. W. 396 (34 A.L.R. 267). Under the allegations of the appellants' complaint, their filling station, while a perpresture, was not a public nuisance per se, because they alleged that it was constructed with all safeguards and protection against fire, and so as not to create any hazard or risk from that source, and likewise that its appliances do not extend into the street, but are located between the sidewalk and curb line of the street, and, therefore, were not in any sense a public nuisance. But notwithstanding these allegations, it was nevertheless within the option or discretion of the city council to determine whether the welfare of the city demanded the abatement of these structures; and unless such discretion was exercised in an arbitrary, discriminatory, and unreasonable manner, or in such manner as to invade the constitutional rights of property, the court will not interfere and declare the ordinance void. See *North Little Rock v. Rose*, 136 Ark. 298, 206 S. W. 449, and cases there cited.

"The complaint does not contain any allegations which show that the ordinance is unreasonable, arbitrary, and discriminatory, or that it invades appellants' constitutional right to own and use their property. The fact that the city council permitted the operation of other stations, known as 'drive-in stations' which were not situated on the street but on private lots, would not tend to show that the ordinance under review was dis-

criminatory, even though, in order to reach these drive-in stations, it was necessary to drive across the sidewalks of the city, and even though the fire hazard was greater from such stations than from the filling station of appellants. Such 'drive-in' stations being situated upon private lots, they cannot be brought within the same class as the filling station of the appellants, which is within the boundaries of the street. Comparison cannot be made between filling stations situated on private lots and filling stations situated within the boundaries of the street, in order to determine whether the ordinance be discriminatory and unreasonable. The right of the city council to pass the ordinance under consideration is predicated upon the fact that the filling station of appellants is within the street of the city and therefore a purpresture, which the council, by an ordinance which is not arbitrary, discriminatory or unreasonable, has the right to remove."

It was further contended by appellant that the curb pumps were placed in the parking with the consent of the city and having expended considerable sums of money in the construction of the same they, therefore, had a vested right to keep them there so long as they did not become a menace to the life or safety of the public; the court finding that appellant had no such right and thereunder cited the case of Keyser vs. City of Boise, 165 P. 1121, an Idaho case, wherein the court said:

"* * * The authorities dealing with the question raised by the demurrer are conflicting, but we are of the opinion that the sounder rule, and the rule supported by the better reasoned cases, is to the effect that the streets, from side to side

and end to end, belong to the public, and are held by the municipality in trust for the use of the public. The city is therefore without authority, in the absence of a legislative enactment expressly permitting it, to grant a private person or corporation a permit to erect or maintain a permanent obstruction in a public street or thoroughfare for a purely private purpose; we have no such statute in this state. It follows that any one obtaining a permit from the city for the private use of a public street, as in this case, takes the same with notice that it is subject to revocation at the will of the city, and, indeed, in this view it matters not whether the use is made in accordance with a permit or without one, the use is merely permissive in either event, and revocable at any time without notice. If the person making such private use of a street goes to expense, he does so at his own risk, and he will not be heard to complain that his property is being taken without due process of law.

“The holder of a permit to install an obstruction in a public street or thoroughfare, for a private purpose, acquires no property or contractual right by reason of the issuance to him of such permit, and whenever the city authorities, in their discretion, deem it necessary, as a proper police measure to vacate and revoke such permit, the holder of the same has no alternative, but must comply with the order of revocation.”

The court further stated that any permissive use of the streets and parkings would be with the full knowledge of the statutory limitations on the part of the officers of the city to grant same and that therefore no property rights could be acquired from such use of the streets by plaintiff.

In the case of *Forbes v. City of Detroit, et. al.*, 102 N.W. 740, a Michigan case, the plaintiff applied to the City of Detroit for a permit to have the bay windows of her building encroach into the streets, which permit was granted subject to removal at any time when directed by the common council. As soon as these windows were completed at great expense the plaintiff received a ten days' notice informing her that her permit was terminated and she was to remove these encroachments. The court said:

“The express terms of the license give the right to the city to terminate it at will, and although it would have been better for Mrs. Forbes had the counsel not granted it in the first place, thus preventing her from the loss that she will suffer by its revocation, that cannot deprive the city of its reserved right, even if its power to grant the privilege be unquestioned. The action of the council is perhaps subject to some criticism, for the failure to fully understand and limit the proposed improvement in the first instance; but there is no indication of bad faith, and it was commendable that action was taken as soon as the misunderstanding developed, instead of permitting more expense to be incurred. There is a manifest propriety in denying the privilege of encroachment upon streets. While Mrs. Forbes is a sufferer without apparent fault upon her part, we see no way of relieving her.”

Rowe v. City of Cincinnati, an Ohio case reported in 159 N.E. at page 365, is a case wherein the plaintiff prayed for a restraining order against the defendant city from enforcing the provisions requiring the removal of

gasoline pumps from between the sidewalk and the curb. The court said in part that the use of the street for such purpose is merely a permissive use under a temporary license which creates no vested right to use the street for an exclusively private business and may at any time be withdrawn by the city. And further said an abutting owner does not have such right of property in the public streets as to give him the right to appropriate a portion of the street permanently to the purposes of his private business. Any privilege which the plaintiff in error heretofore had or enjoyed by virtue of the permit from the city has now been revoked. That privilege at most constituted a mere license or permissive use. They therein cited the case of *City of New Orleans v. Kaufman*, a Louisiana case, 70 So. 874, wherein the court said:

“City ordinance prohibiting the erection of sheds, signs, etc., in Napoleon avenue held to be valid.

“The public right to the use of the street goes to the full width of the street, and extends indefinitely upward and downward,

“The municipal officers may temporarily tolerate or permit minor obstructions to the full use of the streets which they deem not injurious to the rights of the public, but such toleration may be ended, or permission revoked, at any time by the same or any succeeding council.”

They also cite the case of *Eddy v. Granger*, City Treasurer, a Rhode Island case reported in 31 Atl. at page 831, wherein the court said: “Permission from a

municipality to use a public street for a private drain is at most a revocable license, and cannot create a vested right to maintain the drain." The court therein cites several other cases which are very much in point with our present case.

In the case of *Chapman v. City of Lincoln*, a Nebraska case reported in 121 N.W. 596, the plaintiff sought a temporary injunction from the enforcement of a city ordinance requiring the removal of stands set up on the city's sidewalks for the sale of fruits and other merchandise. The court held the fact that defendant city in the past has been permitting these violations of its ordinances and the statutes of the state, but has now commenced the work of removing all obstructions and may well be construed as evidence from the fact that it intends to prosecute the good work to a final and proper conclusion. Nor is the city estopped by reason of its failure to enforce the ordinances in the past or by reason of its permission of such violation from now insisting upon a strict observance of its ordinances.

In the case of *Union Institution For Savings in City of Boston v. City of Boston*, a Massachusetts case reported in 112 N.E. 637, wherein a temporary injunction was requested from the enforcement of an order requiring the removal of a large street clock which had been installed under permit issued by the city, the court said that the contention "that the erection of the clock under this permit constituted a contract which cannot be im-

paired, as well as a vested property right which cannot be taken from the plaintiff except by the power of eminent domain," necessarily assumes that the board or agents of the commonwealth, by necessary implication is authorized by the statute to contract to give up and surrender its and the commonwealth's control of the full use of public highways. That such authority is not implied as necessary to the proper exercise of the power conferred is obvious. 3 McQuillan, Municipal Corp. Sec. 2844. The right granted is not a franchise or a contract, but is a license which legalizes that form of obstruction in a public highway which would otherwise constitute a nuisance.

In the case of *Mettler v. City of Ottumwa*, an Iowa case reported in 196 N.W. at page 1000, the court said permission granted to the owner of private property to use a portion of the street for an areaway may be revoked at any time in the sound discretion of the council.

In the case of *Robinson v. City of Spokane*, a Washington case reported in 120 P. 101, the court held that the abutting owner had no property interest in the trees planted along the highway, saying, it seems clear that whatever right the city may have heretofore granted to abutting owners to plant trees in the street, such right was a mere permissive right or a license which might be revoked at any time and no vested rights could arise therefrom. The city in its legislative capacity might exercise this power to revoke the license and cause the

removal of any obstruction in the streets without liability.

In Utah I am unable to find any case that has been decided exactly in point. However, in the case of *Morris v. Salt Lake City*, reported in 101 P. 373, the court said:

“Upon the merits of the appeal, it is insisted by counsel for the city: That it had the exclusive right to establish street and sidewalk grades; that under the statutes of this state full power and authority over streets is conferred upon cities, with the right to grade, gutter, and improve them as may seem proper to the city authorities; that the sidewalk in question was planned and laid strictly in accordance with, and pursuant to, the powers conferred by the statute; and that, while an abutting lot owner may plant trees in the street in front of his premises, such trees are nevertheless subject to the control of the city, and if, in the exercise of its lawful powers, when reasonably exercised, it becomes necessary to remove or destroy any trees growing in the street, the city may remove or destroy them.”

and

“While an abutting lot owner may therefore, plant trees in a street in front of his premises, and may acquire an interest in them which the law will protect as against any one who, without lawful authority, injures them or destroys them, yet, notwithstanding this, the lot owner plants the trees in the street subject to the rights of the public.”

Also the decision of the Utah Supreme Court in the case of *Salt Lake City v. Schuback*, reported in 159 Pac. 2d, 149, sets down the rule that cities may authorize

limited use of the sidewalks for the benefit of adjacent property owners, but that the same are at all times subject to the right of control by the cities over the use of said sidewalks.

Also in the case of *Lewis v. Pingree National Bank*, a Utah case reported in 151 Pac. 558, the court held that a private person had full power to abate any encroachment into a public street, however the same being subject to modification by a court of equity. If this action had been commenced by the city rather than by an individual I feel the decision would have required the removal of the encroachment herein referred to.

III. THE COURT CANNOT PASS UPON THE WISDOM OF THE CITY COMMISSIONERS IN MAKING AND ENTERING THEIR ORDER OF REMOVAL OF SIGNS IN THE STREETS OF SALT LAKE CITY.

Appellants contend in their argument that the city acted arbitrarily and capriciously because its order of removal was not supported by any reason, logic, lawful classification or legitimate objective and set out more specifically under sub-paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i) and (j) of paragraph 11 of their complaint their reasons why the city's order of removal was discriminating and unlawful, and appellants further contend that it is incumbent upon the city to set forth its reasons or findings showing a public necessity for the use of the streets by the public before such order of removal can issue.

By far the great weight of authority and number of cases hold that when the city is granted power to exercise its discretion the presumption will be that the city has not abused such discretion but has acted in good faith for the benefit of the public. It is further held that it is necessary to plead and prove a clear and palpable abuse of such discretion on the part of the city to enjoin any action taken by it.

Here the appellants allege nothing in their complaint showing an abuse of discretion on the part of the city but merely state that in appellants' opinion certain facts which might require a removal of their signs were non-existing at the date of the issuing of the order of removal by the city. Clearly the courts cannot substitute theirs or others opinions or judgment for that of the city's, the proper and ordered procedure being for appellants to convince the city commission in a regular official meeting that the city had erred in the issuance of such an order.

A leading case sustaining this position is that of *Groover v. City of Irvine*, a Kentucky case reported in 300 S.W. 904, in which case the plaintiff sought to enjoin the city from issuing a franchise and alleged in his petition that the Mayor of the city was interested in the company seeking the franchise; that he had procured his brother to bid on said franchise and that the plaintiff's brother was outbid and that still the bid was given to the Mayor's company. In answer to said petition the court said:

“In granting franchises for the public benefit, a city council acts in a legislative capacity. In the exercise of this power a discretion is vested, which cannot be taken away by the courts. * * * However, when the exercise of the power and discretion to reject bids is attacked in the courts, the presumption will be indulged that the council has not abused its discretion, but has acted with reason and in good faith for the benefit of the public. To proceed upon any other theory would be to substitute the judgment and discretion of the courts for the judgment of the members of the council with whom the lawmakers have seen fit to lodge the power. *Little Rock Railway & Electric Company v. Dowell*, 101 Ark. 223, 142 S. W. 165, Ann. Cas. 1913D, 1086. Hence it is incumbent on one who calls in question the discretion of the council to allege and prove facts showing that the council acted arbitrarily or corruptly, and was therefore guilty of a clear and palpable abuse of discretion.

“Here the sole facts relied on by the successful bidder are that the board of council rejected all bids, and that the Mayor, who was interested in another telephone company having a franchise in the city, used his influence and secured the passage of an ordinance or resolution undertaking to repeal the ordinance granting the franchise, and to set aside the sale. It is not charged that the mayor used any improper or corrupt influence over the members of the council, or even that their action was induced solely by such influence as he attempted to use. Therefore the case is one where, notwithstanding the allegations of the pleadings, the members of the council may have acted with reason and in the utmost good faith. That being true, the facts pleaded are not suf-

ficient to show a clear and palpable abuse of discretion on the part of the members of the city council. It follows that the plaintiff did not show himself entitled to a mandatory injunction requiring the council to accept his bid, and that the chancellor did not err in sustaining the demurrer to the petition as amended.”

In the case of *Ex Parte Stallcup*s, a Texas case reported in 220 S.W. 547, the plaintiff contended that the city acted arbitrarily and capriciously in eliminating certain parking zones and the court said:

“Why the city council abrogated that particular stand is not shown, nor has it been shown that it was without the power of the city council legitimately exercise. The creation of stands of this character and their abolition is largely discretionary with the city council. What may operate at one time to create the stand may be not proper at another time. The solution of these matters is largely within the discretion of the city council, and in order to show their unreasonableness facts must be adduced. In a general way it may be stated that the authorities hold that such ordinances are within the power of the city council, and the authority conferred upon that governing body of the municipal corporation, and unless they violate the Constitution or the general law of the land as enacted by the Legislature, or are unreasonable and arbitrary, they will be upheld.”

In the case of *Lacey v. City of Oskaloosa*, an Iowa case reported in 121 N.W. 542, the plaintiff sought to restrain the city from removing certain hitching posts from the city streets. The court said:

“The fee title of the streets is in the town, and no private person has any legal right to erect any structure therein for the purpose of carrying on his private business, and if, having done so, he is required to remove his building or structure, or whatever it may be, from the street, he has no cause of complaint. He is deprived of no right.”

The court further said:

“The limited extent of the obstruction is immaterial as affecting the right of the city to remove it. The fact that, notwithstanding the obstruction, there is still ample room left for passage of teams and travelers, will not exempt it from liability to removal whenever ordered by the proper municipal authority.”

And the court further says:

“The powers granted to the town are legislative in character, and within the limits prescribed by statute are plenary. The only limit upon them which the courts have been inclined to recognize is that they shall not be exercised unreasonably. The wisdom of a legislative act is not a matter for judicial consideration or review, nor will the courts inquire into the necessity of a change or improvement in a public street ordered in due form by municipal authority.”

In the case of *Edaburn v. City of Creston*, an Iowa case reported in 202 N.W. 580, the plaintiff sought to enjoin the city from an order requiring the removal of a gas filling station from the curbing of congested streets, wherein the court said:

“City councils are by statute given control of the streets of municipalities, and it is their duty to maintain and keep them free from obstructions and nuisances. This court cannot pass upon the wisdom, or lack thereof, on the part of the city council of Creston in the enactment of the ordinance in question, nor do we perceive any theory upon which its enforcement can be properly enjoined upon the record before us.”

In the case of *Morris v. Salt Lake City*, reported in 101 Pac. 373, the court said:

“The courts may not control the city in the exercise of its rights in making public improvements, nor can the courts ordinarily review the actions of the city authorities in their determination of what the improvement shall be and how its plans shall be executed.”

And further:

“As a general statement therefore it may be said that the law authorizes the city authorities to exercise their own judgment in establishing streets or sidewalk grades and in formulating plans for improvements of that or any other public character. . . . It is also clear that the execution of the plans adopted may not be arrested or the plans reviewed by either a court or jury, unless it is made to appear that they were conceived in bad faith, or that they are oppressive or clearly unreasonable, arbitrary or capricious.”

In the case of *Broadbent v. Gibson*, a Utah case reported in 140 Pac. 2d 943, the court said:

“A court is not concerned with the wisdom or policy of the law and cannot substitute its

judgment for that of the legislative body. If reasonable minds might differ as to the reasonableness of the regulation, the law must be upheld."

IV. PROPER NOTICE OF THE ORDER OF REMOVAL WAS GIVEN TO EACH APPELLANT.

The appellants did not urge the first point of their argument to any great extent and rightfully so, for in paragraph 6 of appellants' brief they allege as follows:

"6. Twice during the year 1947 officials of the defendant notified groups of the plaintiffs that signs on parking or curb areas of the streets of defendant city should be removed and that permits for a continued use of said signs would not be removed."

And again in paragraph 12 they allege:

"12. This action is brought in behalf of all persons situated similarly to plaintiffs or any of them, which persons may join as plaintiffs in this cause or have the benefit of this proceeding without joining."

And further, in paragraph 14 they allege:

"14. Defendant has given notice to plaintiffs and to all of them that their existing signs must be removed on or before February 15, 1948, and that unless so removed the defendant will take action against each plaintiff for removal of said signs."

Certainly based upon the above allegations contained in appellants' complaint, appellants cannot now

be held to complain that they were not given proper notice of the city's order of removal.

V. THE ORDER OF REMOVAL OF SIGNS WAS GIVEN TO EACH HOLDER OF A PERMIT OR LICENSE SIMILARLY SITUATED OR LOCATED IN SALT LAKE CITY.

The appellants further contend that they are being discriminated against because owners of signs affixed to buildings which project over the public sidewalks and owners of areaways located under public sidewalks were not ordered to remove such signs or encroachments by the city.

Paragraph 4 of appellants' complaint alleges as follows:

"4. Each of the plaintiffs is the owner of a sign or signs advertising the business of such plaintiff and inviting patronage of said business from members of the public who travel upon and use the streets of Salt Lake City, and each of said signs is situated upon that portion of the public streets known as the curbing or parking area lying and being between the curb or edge of the portion of the street used for vehicular traffic and the sidewalk or the portion used for pedestrian traffic, and each of said signs is mounted upon a support which is affixed to or rests upon said portion of the public street. None of said signs protrudes over or is above any portion of any public street which is customarily used by pedestrians for walking, by vehicular traffic for travel or movement, or by any other group of persons except

these plaintiffs, who care for the lawn, flowers, shrubs, and trees in said parking areas and service said signs as and when service is needed.”

And paragraph 12 of said complaint alleges:

“12. This action is brought in behalf of all persons situated similarly to plaintiffs or any of them, which persons may join as plaintiffs in this cause or have the benefit of this proceeding without joining.”

From the said allegations of appellants' complaint the trial court must take as an established fact that all owners of the particular type and location of signs ordered removed by the city are parties to this action and that said order of removal is not being enforced only against a portion of the group of such owners similarly located, as inferred by appellants in their brief.

The law is well established that an order or an ordinance which operates uniformly against all those similarly located or to a particular class are valid and should be upheld.

The owners of areaways are in a different class than owners of signs, and owners of projection signs located over public sidewalks are in a different class than owners of signs established on standards affixed to the ground and located between the sidewalk and curb lines.

Perhaps a future city commission would in their sound discretion prefer to eliminate the projection signs and permit the establishment of curb signs but as has been heretofore discussed, such discretion is not to be

interfered with or substituted by the discretion of others or of courts.

The Utah Legislature created a distinction in the curb signs and other structures located over the sidewalks and therefore placed them in different classes, as is shown by the wording of Sections 15-8-23 and 15-8-26.

In the case of *Mettler v. City of Ottumwa*, an Iowa case reported in 196 N.W. on page 1000, the court permitted evidence to be introduced to prove that the city council acted arbitrarily when it ordered appellant "to remove the areaway and close the opening, and that discrimination in favor of the owners of other buildings similarly situated and used is shown by the neglect and failure of the officers to order areaways used in connection therewith to be removed. Of course, such action of the city council, if shown, would be intolerable. The weight of the evidence, however, tends to show that many areaways have already been closed in the business district, and that the city council is proceeding cautiously in the matter, but requiring each owner to remove the obstruction whenever the public exigencies demand the space occupied thereby. The ordinance is not in its terms discriminatory, but provides for, and contemplates, uniformity of operation."

In the case of *City of Pierce v. Schramm*, a Nebraska case reported in 216 N.W. 809, the court found against the city who made an order requiring one owner to remove his gasoline pumps from the curb and therein said:

“Here those similarly situated are not even made parties to the suit and the defendant is arbitrarily selected out of the group of those similarly situated, and that without any intention on the part of the city of in any manner molesting the others, the indication being that had the city proceeded against all those similarly located, the action would have been upheld.”

In the case of *Broadbent v. Gibson*, *supra*, the court said:

“In determining whether or not this classification is unconstitutional, it must be remembered that discrimination is the very essence of classification and is not objectionable unless founded upon distinctions which the court is compelled to find unreasonable. The legislature has a wide discretion in determining what shall come within the class of permitted activities and what shall be excluded.”

VI. UNDER CITY'S DELEGATED POWERS IT IS NOT REQUIRED THAT SECTION 5720 OF THE REVISED ORDINANCES OF SALT LAKE CITY, UTAH, 1944, CONTAIN STANDARDS OR RULES TO GUIDE THE COMMISSIONERS OF SALT LAKE CITY OR PUBLIC IN THE MATTER OF THE REMOVAL OF LICENSED SIGNS.

The fourth and last point argued by appellants in their brief contends that Section 5720 of the Revised Ordinances of Salt Lake City, Utah, 1944, is void because it does not contain standards or rules to guide the city commission or public in the removal of licensed signs and in support thereof cite certain cases.

“The generally accepted rule is to the effect that a statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business, profession, appliance, etc., in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals, etc., according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform,—is unconstitutional and void.”

There are, however, very definite exemptions to this general rule, one being to the effect that it is not always necessary that statutes and ordinances prescribe a specific rule of action, but, on the other hand, some situations requiring the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare.

Another exception is where mere matters involving an exercise of discretion as to details in enforcing otherwise valid ordinances may be left to designated officials.

And still another exception is where the discretion is with respect to matters of mere privilege as where the discretion relates to a business, the carrying on of which is a mere matter of privilege because of a character

tending to be injurious rather than an ordinary lawful business, the carrying on of which creates a property right or vested interest. Arbitrary discretion as to the granting of licenses or revoking of licenses may lawfully be delegated to public officials without prescribing definite rules of action.

Section 5720 of the Revised Ordinances of Salt Lake City, Utah, 1944, definitely comes under two of these exceptions to the general rule; the first being that of an exercise of police power in the enforcement of said ordinances, as has been more specifically referred to in the case of *Palace Garage v. Oklahoma City*, *supra*; and also that exception allowing discretion with respect to a matter of mere privilege, for no one in the city of Salt Lake City has the absolute right to install or maintain signs in the public streets of Salt Lake City.

Section 15-8-26 delegates to cities in Utah the right to regulate or prevent the use of its streets for sign posts and therefore definitely the city has the right of discretion with respect to the matter of granting or revoking a permit for such use of its streets.

In 92 A.L.R. at page 410 it is said:

“As an exception or qualification to the rule stated, it has been held that it is not always necessary that statutes and ordinances prescribe a special rule of action, but, on the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a def-

inite comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety, and general welfare. It may be noted that the modern tendency is to be more liberal in permitting grants of discretion to administrative bodies or officers in order to facilitate the administration of laws as the complexity of economic and governmental condition increases."

In the case of *State v. Cohen*, a New Hampshire case reported in 63 Atl. 928, the court held:

"A statute authorizing city officials to license persons 'deemed by them to be suitable' to be junk dealers, and to determine and designate the places where the licensees were to carry on their business, was held constitutional as against the objection that it granted arbitrary power, on the theory that the junk business endangers the public morals, safety, and welfare, and that in such a case a reasonable discretion may be vested in public officials. With respect to the provision relating to determination of the place of business, the court said that the same was necessary for the protection of the public against the dangers of the spread of contagious diseases and of conflagration, etc. And upon the question of suitability of applicants, see the case as treated."

And in the case of *Racine v. District Ct.*, a Rhode

Island case reported in 98 Atl. 97, the court said:

"An ordinance authorizing the city clerk, upon the approval of the chief of police, to grant motorbus licenses to individuals, firms, and corporations deemed suitable to conduct such bus, was upheld as against the contention that it left

everything 'to the unbridled imagination, caprice, discretion, or fancy of the city clerk and the chief of police,' the court proceeding upon the theory that it will be assumed that there will be no abuse of discretion, and that the uncontrolled discretion arose from the fact it was difficult to define in advance upon what conditions the permits should be granted."

In *Crumpton v. Montgomery*, an Alabama case reported in 59 So. 294, the court said:

"That the selection of the beneficiaries of a mere privilege, not involving a matter of right, may be committed to the discretion of a body created for that purpose, and so without impinging upon any vested right of one who desired to enjoy the privilege, or from whom it was, in the discretion of the body, withdrawn."

In the case of *Newbern v. McCann*, a Tennessee case reported in 58 S.W. 114, the court held that where the business is a matter of privilege and not a matter of right and is subject to police regulation, a much larger discretion should be given in order to protect the welfare of the people. It has been held that a statute authorizing township boards to license billiard and pool halls, whenever in the judgment of the board it shall be to the best interests of the township to grant the same, is not unconstitutional on the ground that it grants an arbitrary and uncontrolled discretion to such township boards.

In the case of *Contract Cartage Co. v. Morris*, a Washington D.C. case reported in 59 Fed. 2d 437, which case involved "a statute limiting the weight and dimen-

sions of vehicles on the state highways, and empowering highway officials to grant special permits for limited periods for the operation of vehicles exceeding the limitations set by the statute when in their opinion a sufficient emergency should exist. It was held that leaving the determination of the existence of an emergency to official judgment without definition did not amount to an invalid delegation of legislative power, the court saying: 'The word 'emergency' is used in its plain, ordinary signification, and, as defined by the lexicographers, means or implies a pressing necessity; an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy'."

And in the case of *Winter v. Barrett*, an Illinois case reported in 186 N.E. 113, the court said:

"In enacting laws the legislature cannot deal with the details of every particular case, and reasonable discretion as to the manner of executing a law must necessarily be given to administrative officers. Such officers, in the performance of their duties, are frequently called upon to exercise judgment and discretion, to investigate and decide, and yet in doing so they do not exercise judicial power within the meaning of the Constitution."

In the case of *Thompson v. Smith*, a Virginia case reported 154 S.E. 579, the court said:

"Mere matters of detail within the policy and the legal principles and standards established by the statute or ordinance may properly be left to

administrative discretion; for the determination of such matters of detail is more essentially ministerial than legislative. In declaring the policy of the law and fixing the legal principles and standards which are to control in the administration of the law, general terms which get precision from the technical knowledge or sense and experience of men and thereby become reasonably certain may be used; and an administrative officer or bureau may be invested with the power to ascertain and determine whether the qualifications, facts, or conditions comprehended in and required by such general terms exist, and whether the provisions of the law so fixed and declared have been complied with in accordance with the generally accepted meaning of the words."

And in the case of *Southern R. Co. v. Com.*, a Virginia case reported in 167 S.E. 578, it is stated:

"A statute authorizing the state highway commissioner to require railroads in the state to build overhead crossings when in his opinion such would be necessary for public safety or convenience was held not to be a delegation of legislative powers. The court stated that, while the legislature is the source from which legislation must come, if a statute sufficiently indicates legislative purpose, and has merely left administrative details to some agent, it is not invalid, the court further remarking that a legislature does not sit continuously, and must necessarily work with and through some such instrumentality."

And in the case of *State ex rel. v. Milwaukee*, a Wisconsin case reported in 240 N.W. 847, it was held:

“That in so far as an ordinance authorized revocation of licenses by the mayor ‘whenever he shall consider it necessary or expedient for the good order of the city so to do,’ the city council had left to the mayor only the administrative function of ascertaining the existence of facts because of which revocation is necessary or expedient for such good order, and that the delegation of the power of revocation was not void as failing to fix a standard for the mayor’s action and thereby amounting to an unconstitutional delegation of legislative powers to a quasi judicial officer. In this case, the mayor had revoked a license issued under the ordinance in question permitting the conduction of a Marathon dance.”

In the case of *Ex Parte Graham*, a California case reported in 269 Pac. 183, the court held that a delegation of power to municipal boards or officers to grant and refuse permits to engage in occupations and businesses, which are proper subject of police surveillance and regulation, will be sustained, though involving discretion, on theory that such officers will not use powers villianously or for purpose of oppression or mischief.

Utah apparently follows the exception to the general rule in matters with respect to discretion of mere privilege, for in the case of *Eureka City v. Wilson*, 15 Utah 53, 48 Pac. 41, and affirmed by the United States Supreme Court in 173 U.S. 32, 43 L. Ed. 603, the court held that the moving of buildings on public streets has been held to be a special privilege which can be arbitrarily controlled so that a municipality can by ordinance

make the granting of permits rest upon the discretion of a public official without prescribing a rule of action.

Also see the case of Kenyon Hotel Co. v. Oregon Short Line, a Utah case reported in 220 Pac. at page 382.

CONCLUSION

The order of the trial court in sustaining the general demurrer and its further order dismissing the complaint of appellants for their failure and refusal to amend said complaint, or otherwise plead, should be sustained.

Respectfully submitted,

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