

1948

# Ralph D. Slater, dba International Publishers Service v. Salt Lake City, and L. C. Crowther : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Robert S. Richards; T. Quentin Cannon; Attorneys for Appellant;

---

## Recommended Citation

Brief of Appellant, *Slater v. Salt Lake City*, No. 7222 (Utah Supreme Court, 1948).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/956](https://digitalcommons.law.byu.edu/uofu_sc1/956)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

# In the Supreme Court of the State of Utah

RALPH D. SLATER, dba INTER-  
NATIONAL PUBLISHERS  
SERVICE,

*Appellant,*

vs.

SALT LAKE CITY, a Municipal  
Corporation, and L. C. CROW-  
THER, as Chief of Police of Salt  
Lake City, Utah,

*Respondents.*

**Appellant's  
Brief**

Case No. 7222

# FILED

OCT 20 1948 ROBERT S. RICHARDS

T. QUENTIN CANNON

CLERK, SUPREME COURT, UTAH *Attorneys for Appellant.*

# INDEX

	Page
STATEMENT OF FACTS .....	1
STATEMENT OF APPELLANT'S CASE .....	13
POINTS OF APPELLANT'S ARGUMENT .....	15

- I. Section 3652, Revised Ordinances of Salt Lake City, 1944, is an infringement of the inherent and inalienable right to communicate freely thoughts and opinions and abridges and restrains the freedom of speech and of the press.
- II. Section 3652, Revised Ordinances of Salt Lake City, 1944, is a burden upon interstate commerce in contravention of the Constitution in that it prohibits the free flow of goods between the states and limits the area within which goods may flow.
- III. Section 3652, Revised Ordinances of Salt Lake City, 1944, is void because it is arbitrary, capricious, and not supported by any reason, logic lawful classification or legitimate objective.
- IV. Assuming that Section 3652, Revised Ordinances of Salt Lake City, 1944, is valid on its face, then the discriminatory enforcement of the ordinance is unlawful and should be enjoined.

CONCLUSIONS .....	53
-------------------	----

\* \* \* \*

## STATUTES, AUTHORITIES, AND CASES CITED

Bowden v. Fort Smith, 316 U. S. 584, 62 S. Ct. 1231.....	22
Chicago v. Rhine (1936), 363 Ill. 619, 2 N. E. 2d 905, 105 A. L. R. 1045 .....	19, 41
Chicago v. Schultz (1930), 341 Ill. 208, 173 N. E. 276.....	42
Clark v. City of Burlington, 101 Vt. 391, 143 Atl. 677.....	52
Com. v. Ellis (1893), 158 Mass. 555, 33 N. E. 651.....	40
Covington v. Gausepohl (1933), 250 Ky. 323, 62 S. W. 2d 1040..	51
DeJonge v. Oregon, 299 U. S. 353, 57 S. Ct. 255.....	16
Denver v. Girard (1895), 21 Colo. 447, 42 Pac. 662.....	40
Dobbins v. Los Angeles (1904), 195 U. S. 223, 49 L. Ed. 169, 25 S. Ct. 18 .....	52
Eden v. People, 161 Ill. 296, 43 N. E. 1108.....	39
Emmons v. City of Lewiston, 132 Ill. 380, 24 N. E. 58.....	20
Gitlow v. New York, 268 U. S. 652 45 S. Ct. 625 .....	16
Glicker v. Michigan Liquor Control Commission (1947), 6 Cir., 160 Fed. 2d 96.....	50
Grosjean v. American Press Co., 297 U. S. 233, 56 S. Ct. 444....	16
Good Humor Corporation v. New York City (1943), 290 N. Y. 312, 49 N. E. 2d 153.....	28
Gronlund v. Salt Lake City (1948) — Utah —, 194 Pac. 2d 464 .....	39
Hague v. C. I. O. (1939) 307 U. S. 496, 83 L. Ed. 1423, 595 Ct. 954.....	21, 50
Herndon v. Lowry, 301 U. S. 242, 57 S. Ct. 732.....	16
House Wives League v. Indianapolis (1933), 204 Ind. 685, 185 N. E. 511.....	40
Jobin v. Arizona, 316 U. S. 584, 62 S. Ct. 1231.....	22
Jones v. Opelika, 316 U. S. 584, 62 S. Ct. 1231.....	22
Louisville & N. R. Co. v. Bosworth (1915), 230 Fed. 191.....	52
Lovell v. City of Griffin, 303 U. S. 444.....	16, 18
McKay Jewelers v. Bowron (1942), 19 Cal. 2d 595, 122 Pac. 2d 543 .....	20, 21, 30
Milwaukee v. Kassen, 203 Wis. 383.....	19
Niger v. Van Dell (1914), 85 Misc. 946, 146 N. Y. S. 992, 144 A. L. R. 1347.....	27

# **INDEX—Continued**

	Page
Nippert v. Richmond, 90 L. Ed 496, 66 S. Ct. 586 .....	24
People v. Cohen, 272 N. Y. 319 .....	29
People v. Dmytro (1937), 280 Mich. 82, 273 N. W. 40, 111 A. L. R. 128 .....	41
People v. Finkelstein, 9 N. Y. S. 2d 941.....	35
People v. Klinge, 276 N. Y. 292 .....	29
People v. Friedman (1940) 16 N. Y. S. 2d 925.....	29
Pictorial Review Co. v. City of Alexandria, (1930), 46 Fed. 2d 337 .....	23
Pittman v. Nix (1943), 152 Fla. 378, 11 So. 2d 791, 144 A. L. R. 1341 .....	31
Portnoy v. Hohman (1942), 50 Cal. App. 2d 22, 122 Pac. 2d 533 .....	38
Quigg v. State (1922), 93 So. 139, 84 Fla. 164.....	42
Real Silk Hosiery Mills v. City of Portland, 268 U. S. 315, 45 S. Ct. 549 .....	24
Real Silk Hosiery Mills v. Richmond, California, 298 Fed 126....	24
Schneider v. State (1939), 308 U. S. 147, 84 L. Ed. 144, 60 S. Ct. 146 .....	16, 17, 19, 21, 31
Schul v. King, (1946), (Ohio), 70 N. E. 2d 378.....	29
Shelton v. Mobile (1857), 30 Ala. 540, 68 Am. Dec. 143.....	40
South Holland v. Stein, 373 Ill. 472, 26 N. E. 2d 868.....	21
State v. Barbelais (1906) 101 Me. 512, 64 Atl. 881.....	41
Stromberg v. California, 283 U. S. 359, 51 S. Ct. 532.....	16
State v. Messonlongitis (1898), 74 Minn. 165, 77 N. W. 29.....	40
Village of Ceno Gorch v. Rawlings, 135 Ill. 36, 25 N. E. 1006....	20
Wade v. City and County of San Francisco (1947), ___ Cal. App. 2d ___, 186 Pac. 2d 181.....	47
Walker v. City of Birmingham (1927), 112 So. 823, 216 Ala. 206 .....	52
Whitney v. California, 274 U. S. 357, 47 S. Ct. 641.....	16
Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220	49
* * * *	
Bouvier's Law Dictionary .....	36
McMillan, Municipal Corporations: Vol. 2, page 939 .....	52
National Encyclopedia .....	35
Tiedman, Limitation of the Police Power: Page 293 .....	26
Page 312 .....	44
Webster's New International Dictionary.....	33
Constitution of the United States: Article I, Section 8 .....	22
First Amendment .....	15
14th Amendment, Section 1 .....	16, 25
Federal Code Annotated, Vol 9A, Title 39, Section 224.....	35
Constitution of the State of Utah: Article 1, Section 1.....	16
Article 1, Section 15.....	25
Article 1, Section 24.....	16
Utah Code Annotated, 1943: Section 14-6-16 .....	36
Section 15-8-29 .....	42
Section 42-3-2 .....	36
Section 48-0-10 .....	36
Section 81-6-5 .....	34
Section 103-38-11 .....	36
Revised Ordinances of Salt Lake City, 1944: Section 3647.....	24, 25, 32, 44, 53
Section 3652.....	13, 15, 22, 24, 25, 32, 33, 44, 45, 46, 53
Section 3661 .....	34

# In the Supreme Court of the State of Utah

---

RALPH D, SLATER, dba INTER-  
NATIONAL PUBLISHERS  
SERVICE,

*Appellant,*

vs.

SALT LAKE CITY, a Municipal  
Corporation, and L. C. CROW-  
THER, as Chief of Police of Salt  
Lake City, Utah,

*Respondents.*

**Appellant's  
Brief**

Case No. 7222

---

## STATEMENT OF FACTS

This appeal is from the order of the district court dismissing the complaint for failure to state a cause of action(Tr. 23) following the election of appellant to stand on his complaint upon sustaining of a demurrer thereto. The demurrer (Tr. 18) was based on a failure to state a cause of action or state a case for injunctive relief. The order sustaining the demurrer (Tr. 23) denied the right to amend the complaint and ordered a dismissal thereof, thus indicating that the ruling of the court was for failure to state a cause of action for any

relief whatever. It will therefore be assumed that the ruling of the court was that the complaint stated grounds for equitable relief but that it failed to state a cause of action entitling appellant to any relief whatever.

Since the appeal is on the judgment roll there is no transcript of evidence. There is, however, a memorandum decision (Tr. 20-22) stating the court's reasons for sustaining the demurrer of the respondent. The complaint alleges that the action of respondents is violative of appellants rights of freedom of speech and press, the right to engage in interstate commerce without interference, that it deprives appellant of his business without due process of law, and of the equal protection of the laws, and that the ordinance by which respondents justify their action is discriminatory and unconstitutional.

There follows the complaint, without the title and verification (Tr. 1-8):

---

Plaintiff complains of defendants and for cause of action alleges as follows:

1. That at all times mentioned herein plaintiff, Ralph Slater, was doing business as the International Publishers Service, and as such engaged in business in the state of Utah and elsewhere. Plaintiff as such has filed heretofore with the County Clerk of Salt Lake County, State of Utah, an affidavit of assumed named in the manner required by Section 58-2-1, Utah Code Annotated, 1943.

2. Plaintiff now is and for many years has been a broker representing various national magazine distributors and publishers, and he is, and at all times mentioned herein, was, thoroughly qualified personally, and through agents and employees, to contract and sell subscriptions to, and to sell, magazines such as INTER-MOUNTAIN SPORTSMAN, GOLFER AND SPORTSMAN, DINE AND DANCE, and many other and various publications.

3. It is the business custom of plaintiff to obtain and send agents into all the states of the Union, soliciting and obtaining subscriptions to the publications in paragraph 2 hereof mentioned. For over a year last past, plaintiff doing business as International Publishers Service, has had permanent headquarters in Los Angeles, California.

4. For one and one-half years last past, and particularly for five weeks last past plaintiff has conducted his said business using the methods described in this complaint, and at intervals since 1947 has so conducted said business in Salt Lake City, Utah. Plaintiff is willing to pay any lawful license fees, and to abide by any lawful regulations, so as to do business in Salt Lake City. Plaintiff is protected against derelictions of plaintiff's agents and employees by bonds of the WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY. It has always been and will be the policy of plaintiff to make every effort to assure that the solicitations of magazine subscriptions to the publications aforesaid are conducted in a quiet, fair and lawful

manner; and that subscribers are accepted only in the event they give a definite place of address; and that said subscribers receive that which they contract and pay to receive.

5. Defendant Salt Lake City now is, and at all times mentioned herein was, a municipal corporation within the State of Utah, and as such duly organized and incorporated pursuant to the laws of said State of Utah.

6. Defendant L. C. Crowther, now is, and at all times mentioned herein was, Chief of Police of said Salt Lake City; and as such he now is, and at all times mentioned herein was, charged with the enforcement, in said City of the ordinances hereinafter mentioned.

7. The Board of Commissioners of Salt Lake City, passed and enacted an ordinance known as Section 3652 of the Revised Ordinances of Salt Lake City, Utah, parts of which read as follows:

“It shall be unlawful for any person to peddle or offer for sale, barter or exchange at retail, any garden or farm produce, fruits, butter, eggs, poultry, fish, game, or any other goods, wares or merchandise whatsoever, or any tickets, coupons or receipts representing value or redeemable in service, photographs, works of art, magazine subscriptions, goods or merchandise whatsoever, in upon or along any street of Salt Lake City without first obtaining a license so to do.

“It shall be unlawful for any person, under any circumstances, to peddle, sell or offer for sale any magazine subscriptions, goods, wares



or merchandise whatsoever, in upon or along any of the following streets, to-wit:

“South Temple street from Second East street to First West street; First South street from Second East street to First West street; Second South street from Second East street to First West street; Third South street from Second East street to First West street; Fourth South street from Second East street to First West street; State street from First North street to Fifth South street; Main street from First North street to Fifth South street; and no license shall be granted to any person to peddle in upon or along the said streets above described . . . ,”.

Violations of said ordinances are made punishable by arrest and imprisonment, under provisions of Section 3718 of the said Revised Ordinances of Salt Lake City, Utah.

8. Plaintiff now is and has been, engaged on the public streets and sidewalks in said Salt Lake City, and in areas, doorways and entranceways immediately abutting thereon, in the business of soliciting and selling, *in a quiet, dignified and peaceful manner, without pressure or undue influence*, by and through agents and employees employed by him for the purpose of selling, to persons on said places, subscriptions to the magazines and periodicals aforesaid, for future delivery, and likewise the sale of tangible personal property to be delivered to the purchasers thereof, or to some other person, at a subsequent time. Some of the said subscriptions were and will be sent to other states and were and will be filled by sending into Utah the publications which

are published in other states. Some of the other subscriptions were and will be filled by sending into other states the publications which are published in Utah.

The methods of street solicitation by plaintiff, his agents and employees, described in this complaint, and especially as described in this paragraph 8 hereof, now are, and at all the times mentioned in this complaint were, the major source and the main manner of selling the property and obtaining subscriptions to the publications mentioned in this complaint, including, among other, the property and publications mentioned in paragraphs 2 and 3 of this complaint. The said methods of street solicitation now are, and at all the times mentioned in this complaint were, by far, the most effective method; and, in a great many cases, the only possible methods of selling said property and obtaining said subscriptions.

9. At sundry and various times, while plaintiff was peaceably so engaged in carrying on said business, by and through his agents and employees, in said Salt Lake City, the defendants herein, acting by and through police officers of the defendant municipality, and for the purpose of preventing plaintiff from so soliciting, by and through his agents and employees, sales of such subscriptions and sales of such tangible personal property, arrested certain of plaintiff's said agents and employees for alleged violations of said ordinance, and ordered other of plaintiff's said agents and employees not to make said sales, and threatened to make further arrests of them, and to prosecute all said agents and

employees for alleged violations of said ordinance, thereby preventing and threatening to continue to prevent, plaintiff from carrying on in the manner aforesaid his said business in said Salt Lake City, all to plaintiff's great pecuniary damage and irreparable loss. And plaintiff avers and charges that said arrests, and said orders and said threats of further arrests and prosecutions, were made for the purpose of hindering, harassing, impeding, delaying and frustrating, and did hinder, harass, impede, delay and frustrate the efforts and attempts of plaintiff and his said agents and employees, in carrying on and conducting plaintiff's said business in said Salt Lake City; and plaintiff charges and avers that said arrests, and threatened arrests, and prosecutions, were made by defendants for the purpose of compelling plaintiff, and did compel plaintiff, to stop and abandon the further operation of his said business within the above described portions of Salt Lake City, Utah.

10. Plaintiff is advised by his counsel, and now avers, that said ordinance is, and that all the aforesaid acts and threatened acts of defendants thereunder are, and will be, violative of Sections 15 and 24 of Article I of the Constitution of Utah, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that, said ordinance, not being regulatory, is arbitrary and oppressive, and is an outright prohibition of lawful business and of the right of plaintiff to engage in a lawful business.

11. By their said acts, the defendants, in violation of Sections 15 and 24 of Article I of the Constitution

of Utah, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States, have denied to plaintiffs the equal protection of the laws in the manner following, to-wit:

(1) Many persons other than plaintiff and other than plaintiff's agents and employees have, on numerous occasions, violated with impunity the provisions of said ordinance in that they have on the public streets and sidewalks of said City, doorways and entranceways immediately abutting thereon, solicited, and are continuing to solicit, the sale, to persons on said places of subscriptions to magazines and periodicals for future delivery, goods, wares and merchandise, and have sold, and are continuing to sell, to persons on such places tangible personal property, goods, wares and merchandise.

Among the magazines, periodicals and tangible personal property so sold and so solicited for sale by such other persons are the following:

(a) Magazines known as "Consolation" and "Watchtower", published and circulated by a cult known known as "Jehovah's Witnesses";

(b) Coupons entitling persons of whom a photograph had been taken, to have delivered to him or her, as the case may be, the photograph of himself or herself, as the case may be;

(c) Coupons entitling purchasers to sightseeing tours of Salt Lake City and other places in the state of Utah.

None of said other persons who have so violated

the provisions of said ordinance have ever been arrested or prosecuted, or in anywise molested by defendants, or by either of them, or by any of the agents or representatives of defendants, or of either defendant, or by any of the police officers of said Salt Lake City.

(3) Defendants, their agents and representatives, and police officers of said Salt Lake City who act under the authority of said defendant Chief of Police, have at all times had notice and knowledge of said violations of said ordinance by said third parties as aforesaid, and, possessing such notice and knowledge, defendants, their agents and representatives, and said police officers, with intent to discriminate against plaintiffs and plaintiff's said business, have at all times deliberately refrained from enforcing said ordinance as against said third party violators thereof.

12. Plaintiff is advised by his counsel, and now avers, that said ordinance is, and that all the aforesaid acts and threatened acts of defendants thereunder are, and will be violative of Sections 15 and 24 of Article I of the Constitution of the State of Utah and of the First Amendment to the Constitution of the United States in that said ordinance bars, in the manner alleged, the distribution and dissemination of said publications and thereby prevents the exercise by the publishers and plaintiff of their constitutional rights of the freedom of press and the freedom of speech.

13. Plaintiff is advised by his counsel, and now avers, that said ordinance is, and that all the aforesaid acts and threatened acts of defendants thereunder are,

and will be, violative of Sections 15 and 24 of Article I of the Constitution of the State of Utah, and of the "Equal protection clause" of Section I of said Fourteenth Amendment to the Constitution of the United States in that, without any reasonable basis therefor, said ordinance, which when read together with Section 3647 of the said Revised Ordinances of Salt Lake City, Utah, excluding "newspaper" boys from the class identified as "hawkers", makes an arbitrary classification as between that class of persons who solicit the sale of subscriptions and tangible personal property and that class of persons who solicit the sale of newspapers, thereby arbitrarily discriminating in favor of those who sell newspapers and against those who sell magazines, with the result that there is granted to the class which sells newspapers a privilege from which those who sell magazines are arbitrarily excluded.

14. Plaintiff is advised by his counsel, and now avers, that said ordinance is, and that all the aforesaid acts and threatened acts of defendants thereunder are, and will be, violative of the "commerce clause" of Article I, Section 8 of the Constitution of the United States, in that said acts do, and will, materially burden and interfere with the free flow of legitimate interstate commerce, by preventing plaintiff from obtaining subscriptions for magazines to be sent from other states and from being filled by sending into Utah the publications which are published in the other states, and by preventing plaintiff from obtaining other of said subscriptions for magazines to be sent to other states and

from being filled by sending into the other states the publications which are published in Utah.

15. Plaintiff has no plain, speedy or adequate remedy at law and he files this, his complaint, as a complaint and affidavit for the purpose of securing a temporary restraining order and temporary and permanent injunction against the defendants. The defendants will, unless restrained by this court, enforce the said ordinance against plaintiff and his said agents and representatives and will thereby injure and destroy the plaintiff's said property and property rights, and cause them material and irreparable loss, and plaintiff will be unable to conduct their said business in Salt Lake City. The matter in controversy exceeds, exclusive of interest and costs, many thousands of dollars. The value of the right of plaintiff to carry on his said business, free from the harrassing and unlawful acts threatened by defendants as alleged hereinbefore, exceeds many thousands of dollars. Moreover, unless defendants be restrained from committing the acts which they are threatening to commit, as alleged hereinbefore, there is imminent danger that said agents and representatives will leave the service of plaintiff and plaintiff will be unable to obtain replacements, for fear of and in distress over said acts of defendants, and plaintiff's said business in Salt Lake City, which is and has been over a long period of time a very substantial portion of plaintiff's total business, will be totally destroyed, all to plaintiff's great and irreparable injury and damage. Plaintiff avers that the relief requested herein is absolutely nec-

essary for the protection of plaintiffs, his agents and representatives, against the wanton further molestation by the said defendants.

WHEREFORE, plaintiff prays:

1. That an order issue out of this court, enjoining and restraining the defendants, their officers, agents, servants, employees and attorneys, from interfering with or molesting plaintiff, his agents, representatives in connection with the soliciting by them, or by any of them, of the sales of subscriptions to magazines or periodicals for future delivery, or the sales by them, or by any of them, of any tangible personal property to be delivered at a subsequent time or immediately.

2. For a preliminary and final injunction, enjoining and restraining defendants, their officers, agents, servants, employees and attorneys, from interfering with or molesting plaintiff, his agents, servants and employees in connection with the soliciting by them, or by any of them, of the sales of subscriptions to magazines or periodicals or the sales by them or any of them, of any tangible personal property to be delivered immediately or at a subsequent time.

3. For such other and further relief as the Court may deem just and proper.

ROBERT S. RICHARDS,  
*Attorney for Plaintiff.*



## STATEMENT OF APPELLANT'S CASE

Section 3652 of the Revised Ordinances of Salt Lake City, 1944, provides that peddlers of certain articles must obtain licenses before selling or offering to sell their wares in the city of Salt Lake. It also provides that peddlers of some of those articles may not sell or offer to sell their articles at all within a certain defined business district of the city. The general provision requiring licenses covers those who sell any tickets, coupons or receipts representing value or redeemable in service, photographs, works of art, magazine subscriptions and any goods, wares and merchandise. The latter provision prohibits in the business district the sale only of magazine subscriptions and goods, wares and merchandise. Appellant's contention at the outset is that it is unconstitutional for the city to attempt to prohibit conversations on the public streets notwithstanding those conversations partake of a business nature, for the reason that it is a denial of the right of free speech, and that forbidding the sale of magazine subscriptions is not only a denial of the freedom of speech and press, but also an interference with interstate commerce, inasmuch as the magazines are to be shipped either from without the state of Utah to purchasers in the state or from the state of Utah to purchasers outside of Utah.

If this section is justified it must be for the reason that it is a reasonable prohibition for the purpose of promoting the health, safety, comfort, morals or general welfare of the public. The only purpose, conceivable to appellant, for which the prohibition in this sec-

tion was adopted is to promote the general welfare by assuring the free flow of pedestrian traffic on the sidewalks of the business district. Appellant concedes that the erection of a stand on the public sidewalk or the stopping of a cart from which articles are sold or distributed would be an interference with traffic, which may be prohibited to promote the general welfare. But appellant contends that it is not necessary to the free flow of traffic to prohibit the activities of moving peddlers regardless of what they are selling; that it is not of sufficient importance to the general welfare of the public to restrict certain citizens in their freedom of speech and press, and to interfere with interstate commerce.

Further, appellant contends that as the sections of the ordinances appear on their face there is an unreasonable discrimination in the differentiation between solicitation of magazine subscriptions and the sale of newspapers, tickets, coupons and receipts. The differentiation bears no reasonable relation to the problem of traffic control.

Should the court hold that the ordinance on its face is valid for the reason that the intention of the Board of Commissioners in adopting said ordinance was to prohibit peddling of any kind whatsoever on the streets of the business district, then appellant contends that the intentional discrimination in the enforcement of the ordinance on the part of respondents against appellant, his agents, representatives and employees, in favor of salesmen of tickets for sightseeing tours, photograph

coupons, receipts, ice cream, "poppies," rodeo tickets, etc., is unconstitutional as a denial of equal protection of the law, and should be enjoined.

This argument is advanced under four points.

### **POINTS OF APPELLANT'S ARGUMENT**

I. Section 3652, Revised Ordinances of Salt Lake City, 1944, is an infringement of the inherent and inalienable right to communicate freely thoughts and opinions and abridges and restrains the freedom of speech and of the press.

II. Section 3652, *supra*, is a burden upon interstate commerce in contravention of the Constitution in that it prohibits the free flow of goods between the states and limits the area within which goods may flow.

III. Section 3652, *supra*, is void because it is arbitrary, capricious, and not supported by any reason, logic, lawful classification or legitimate objective.

IV. Assuming that Section 3652, *supra*, is valid on its face. then the discriminatory enforcement of the ordinance is unlawful and should be enjoined.

**I. Section 3652, Revised Ordinances of Salt Lake City, 1944, is an infringement of the inherent and inalienable right to communicate freely thoughts and opinions and abridges and restrains the freedom of speech and of the press.**

Amendment I to the Constitution of the United States provides :

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state. *Schneider v. State* (1939), 308 U. S. 147, 84 L. Ed. 144, 60 S. Ct. 146; *Gitlow v. New York*, 268 U. S. 652; *Whitney v. California*, 274 U. S. 357; *Stromberg v. California*, 283 U. S. 359; *Grosjean v. American Press Co.*, 297 U. S. 233; *DeJonge v. Oregon*, 299 U. S. 353; *Herndon v. Lowry*, 301 U. S. 242; *Lovell v. City of Griffin*, 303 U. S. 444.

Article I, Section 1, of the Constitution of Utah provides:

“All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.”

Article I, Section 15, provides, *inter alia*:

“No law shall be passed to abridge or restrain the freedom of speech or of the press . . . ”

The inherent and inalienable right to enjoy freedom of speech and freedom of the press have been secured by the constitutions of the United States and of the State of Utah.

One of the questions posed by this case is, have the rights secured by the constitution been abridged by this ordinance?

A municipality may enact regulations in the interest of the morals, public safety, health, welfare or convenience, however, these may not abridge the individual liberties secured by the Constitutions to those who wish to speak, write, print or circulate information or opinion. Municipal authorities have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. *Schneider v. State*, *supra*.

Freedom of speech and that of the press are fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government of free men. It stresses the importance of preventing the restrictions of the enjoyment of these liberties.

Where legislative abridgment of these rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. To the courts is assigned the difficult task to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights. *Schneider v. State*, *supra*.

A municipal ordinance prohibiting the distribution,

without a permit, of “circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold,” was held to be invalid on its face, as infringing the constitutional guaranty of freedom of the press. *Lovell v. Griffin*, 303 U. S. 444, 82 L. Ed. 949. In that case Mr. Chief Justice Hughes, speaking for the court, stated:

“Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action . . . It is also well settled that municipal ordinances adopted under state authority constitute state action and are within the prohibition of the amendment . . . The ordinance is not limited to ‘literature’ that is obscene or offensive to public morals or that advocates unlawful conduct . . . The ordinance embraces ‘literature’ in the widest sense. The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation, ‘either by hand or otherwise.’ There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager . . . Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship.

“The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.

“The ordinance cannot be saved because it relates to distribution and not to publication. Liberty of circulating is as essential to that freedom as liberty of publishing;”

The nature of the matter, so long as it be not objectionable upon fundamental grounds, makes little or no difference as it is obvious that the effect of the distribution of handbills, dodgers, newspapers or magazines on the streets will be substantially the same whether they contain printed matter of a commercial nature or political or religious matter. *Schneider v. State*, supra. See also *Milwaukee v. Kassen*, 203 Wis. 383.

The Supreme Court of the State of Illinois, in the case of *Chicago v. Rhine*, 363 Ill. 619, 2 N.E., 2d 905, in attempting to sustain an ordinance prohibiting the sale of magazines within the loop district, stated that because Rhine was “carrying out a private commercial enterprise for personal profit; and that the ordinance was limited to the congested part of the city and was general in character” the ordinance might be sustained.

Mr. Justice Roberts, speaking for the Supreme Court of the United States, save Mr. Justice Reynolds, stated:

“The streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty

of expression in appropriate places abridged on the plea that it may be exercised in some other place.”

The same Illinois Supreme Court held that a city has no authority to require book canvassers who solicit subscriptions for books for future delivery to obtain a license, since such canvassers are neither hawkers nor peddlers. *Emmons v. City of Lewiston*, 132 Ill. 380, 24 N. E. 58; and see *Village of Ceno Gorch v. Rawlings*, 135 Ill. 36, 25 N. E. 1006.

The rights granted by the constitution not only guarantee the right of speech and to write, but also to make known that which is not limited to a person's own writing. *South Holland v. Stein*, 373 Ill. 472, 26 N. E. 2d 868.

In the case of *McKay Jewelers v. Bowron* (1942), 19 Cal. 2d 595; 122 P. 2d 543, the California Supreme Court found an ordinance prohibiting solicitations from doorways and entrance ways of passersby on the street unconstitutional as not necessary to the general welfare with the comment that it is conceivable that some hypersensitive individuals may find this type of solicitation offensive but that it is not sufficient to justify the prohibition of an otherwise lawful method of conducting a business.

The right to conduct a private business free from unreasonable regulation is just as sacred as the right of the members of a labor organization to conduct a campaign for better labor conditions, and should receive equal protection under the constitutional guarantees.



To permit peaceful solicitation by a picket on the sidewalk and prohibit peaceful solicitation from a doorway abutting on the sidewalk would be gross discrimination.

In summation, it might be stated, that the basis for the ordinance might be for the morals, health, safety, convenience, or general welfare of the public. No contention is made that such sales of subscriptions to magazines have any relation to the health or morals of the community. As to the safety, the courts have found that if the purpose be to prevent fraud by taking payment in advance, other methods of protection are available to the city fathers and the infringements upon these sacred constitutional rights should not be so abridged. *Schneider v. State*, supra. If the purpose be to prevent the littering of the streets, such a situation may be avoided by means other than this infringement. In the cited case, the court stated that "the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." See *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 83 L. Ed. 1423, 59 S. Ct. 954. The case of *McKay Jewelers v. Bowron*, supra, states specifically that the fact one might not desire to be solicited on the streets did not provide a constitutional basis for an ordinance prohibiting the same and that solicitations on the streets are sanctioned and recognized by the courts. There is no evidence in the case at bar that the streets are congested and warrant such legislation and the complaint

specifically alleges that traffic is not hindered in its free flow. The instant case forms no basis for the infringement of the constitutional rights of appellant so as to deprive him and his agents, employees and representatives of freedom of speech and of the press.

“Ordinances absolutely prohibiting the exercise of the rights to disseminate information are, a fortiori, invalid.” *Jones v. Opelika*, *Bowden v. Fort Smith*, *Jobin v. Arizona*, 316 U. S. 584.

**II. Section 3652, supra, is a burden upon interstate commerce in contravention of the Constitution in that it prohibits the free flow of goods between the states and limits the area within which goods may flow.**

Article I, Section 8, of the Constitution of the United States provides, *inter alia*:

“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States: . . .”

“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .”

The articles, namely magazines, being sold are publications originating outside of the State of Utah in the main. The publications are being sold by agents from outside the State of Utah. The appellant is not a resident of the State of Utah. The orders obtained are sent outside the State of Utah for fulfillment. The articles purchased are mailed into the State of Utah

to the purchasers. There is no contention that the business is in any manner not a legitimate business conducted in accordance with proper morals and ethics.

An ordinance of Alexandria, Louisiana, provided that a canvasser must be licensed to solicit sales within the city. Agents of the Pictorial Review Company were arrested because they had failed to obtain a license prior to soliciting magazine subscriptions in the city. In *Pictorial Review Co. v. City of Alexandria*, (1930) 46 Fed. 2d 337, the Federal District Court held that:

“Although the city undoubtedly had the right to protect citizens from imposition by persons who might violate its police regulations intended for protection of property, morals, health, and safety, where the nature of business was inherently dangerous, it was established that the business, being that of publishing of magazines for which subscriptions were taken, was harmless and legitimate traffic in interstate commerce.”

The city of Portland, Oregon, enacted an ordinance requiring the purchase of a license and payment of a fee therefor by peddlers or solicitors canvassing from door to door. Hosiery salesmen were selling hose for future delivery and collecting a down payment. After the payment was made the order was sent to the home office. The corporation was an Illinois corporation. The hosiery were manufactured in Indiana. The home office shipped the hosiery to the purchaser C. O. D. on the balance due. The Supreme Court of the United States determined, upon the constitutionality of the ordinance being challenged, that:

“The ordinance materially burdens interstate commerce and conflicts with the Commerce clause.” *Real Silk Hosiery Mills. v. City of Portland et al*, 268 U. S. 315.

A city ordinance prohibited solicitors, peddlers and agents going to houses having the sign “No peddlers” upon them in order to make sales. Salesmen for Real Silk Hosiery Mills, operating as set forth in the previous paragraph in the city of Richmond, California, were charged with violating said ordinance. The United States District Court found that the ordinance was a burden upon the interstate commerce as it enlarged the group of individuals who were prohibited from approaching such houses to more than peddlers. *Real Silk Hosiery Mills v. Richmond, California*, 298 Fed. 126. See *Nippert v. Richmond*, 90 L. Ed, 496, 66 S. Ct. 586.

In the case at bar, the agent is prohibited from soliciting business within a large section of the city by this ordinance and therefore such restriction limits the free flow of business between the states and that area and is a burden upon interstate commerce.

**III. Section 3652, Revised Ordinances of Salt Lake City, 1944, is void because it is arbitrary capricious, and not supported by any reason, logic, lawful classification or legitimate objective.**

The complaint alleges that Section 3652, Revised Ordinances of Salt Lake City, 1944, particularly when read together with Section 3647 thereof, makes an arbitrary classification as between that class of persons who solicit the sale of magazine subscriptions,

goods, wares and merchandise and that class of persons who solicit the sale of newspapers. In defining Hawkers, Section 3647 provides that any person selling or offering for sale any article or thing, except newspapers upon any open or public ground shall be deemed a hawker. Section 3652 under which appellant, his agents, representatives and employees were arrested and prosecuted provides that it shall be unlawful for any person under any circumstances, to peddle, sell or offer for sale any magazine subscriptions, goods, wares or merchandise whatsoever on the streets of the defined business district. This arbitrary classification, it is submitted, is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.”

and it is also violative of the Constitution of the State of Utah, Section 24, Article 1, which requires that

“All laws of a general nature shall have uniform operation.”

Laws and ordinances of a general nature, which limit and restrict the liberty of citizens, may be enforced if they are reasonably necessary for the protection, safety, health, morals, comfort or general wel-

fare of the general public. The public power of a state or municipality, however, must not be exercised in such a manner as to operate without equal force upon citizens of the same class. Classification of citizens must be based upon some real differentiation, and the differentiation must bear reasonable relation to the purpose of the law or ordinance.

At the outset it must be determined for what purpose the city fathers saw fit to prohibit sales of magazine subscriptions in the business district of the city. The purposes for which the ordinance could possibly have been adopted are five fold, and will be considered in turn.

(1) To guard against the possibility of fraud arising out of paying for a subscription to magazines for future delivery. Had this been the intention of the city fathers, it seems that the prohibition would have been general and not limited to street solicitation in the business district, and the ban would not have extended to "goods, wares and merchandise" which can be delivered right on the street at the time of the sale. Suppose the ordinance had been general in that it prohibited the sale of magazine subscriptions any place in the city, and suppose it only covered sales of orders for future delivery, is the possibility of fraud sufficient reason for such a prohibition? Tiedman on Limitation of Police Power, at page 293, has expressed himself on the allied problem of suppression of the ticket brokerage business as follows:

"It is not contended that the business of

ticket brokerage is in itself of a fraudulent character. The business can be honestly conducted by honest men. It is only claimed that in its prosecution the business presents manifold opportunities for the commission of fraud. If that were a justifiable ground for abolishing any business, many important, perhaps some of the most beneficial employments and professions could be properly prohibited. There is no profession or employment that furnishes more abundant opportunities for the practice of frauds upon defenseless victims than does the profession of law. But it would be idle to assert that because of the frequency of fraudulent practices among lawyers, the state could abolish the profession and forbid the practice of law. There is no difference in principle between the two cases.”

and in *Niger v. Van Dell* (1914), 85 Misc. 92, 146 N.Y.S. 992, 144 A.L.R. 1347, a statute making it unlawful for officers of a club or association to solicit members as a measure in prevention of fraud was held discriminatory and invalid. The court said:

“It is not legitimate legislation to prohibit the prosecution of a lawful business or calling because some unscrupulous persons may, in connection with it, perpetrate fraud. The thing to do is to prohibit and punish the fraud.”

(2) To protect the property owner and taxpayer who conducts his business upon his own private property from competition of peddlers and hawkers. Here again the objection to such competition would apply to peddlers operating in the less congested districts, and there would be no reason for limiting the prohibition

to the business district. Furthermore, protection from competition is not a valid basis for such prohibition against peddlers and hawkers, for from time immemorial the streets have been used and are intended to be used by the public which includes peddlers and vendors in the conduct of their business. In the case of *Good Humor Corporation v. New York City* (1943), 290 N.Y. 312, 49 N. E. (2d) 153, the plaintiff which engaged in the business of selling ice cream products from push carts on the streets of New York City was granted an injunction restraining the enforcement of a Local Law prohibiting itinerant peddlers on the streets of the city. The Local Law had been adopted for the express purpose of protecting those who pay rent and taxes from competition by itinerant peddlers. Mr. Justice Cardoza, speaking for the Court condemned the action of the city in the following words:

“Peddling merchandise upon streets and highways is a lawful vocation recognized and regulated by general statutes adopted from time to time by the Legislature. Though streets and highways are intended primarily for the use of pedestrians and vehicles travelling upon them, the vending of merchandise by persons who have no fixed place of business and who carry their merchandise in vehicles or on their persons and who seek customers from those passing along the streets is a common and traditional use of the streets. The right to use a street by any person even for traveling ‘must be exercised in a mode consistent with the equal rights of others to use the highway’. (*People v. Rosenheimer* 209 N. Y. 115, 120). Any use of the streets, and certainly



any use of the streets for a private business purpose, which interferes unduly with the use of the streets by others for travel, may doubtless be prohibited, in a proper case, by the legislature. We need not now pause to define the exact limits of the legislative power of a city to adopt local laws 'in relation to the care, management and use of the streets'. Certainly that power is not broad enough to prohibit use of the street for a lawful business, recognized by statute, for the sole purpose of protecting rent payers and taxpayers against competition from others who do not pay rent or taxes. The object of the Local Law as declared in the report of the Committee on general welfare is not an object which a city has constitutional power to make effective."

He further asserted that to prohibit all street peddlers, and cause complete prohibition, where regulation or prohibition of only the undesirable peddlers was possible, would be unreasonable, especially where discrimination would not be impracticable. This principal of law has been recognized in other New York cases where an ordinance prohibiting street sales in a certain area of the city was struck down as discriminatory. *People v. Klinge*, 276 N. Y. 292; see also *People v. Cohen*, 272 N. Y. 319. Another city ordinance prohibiting the sale of ice cream was held unconstitutional because it bore no real and substantial relation to the health, safety or general welfare of the public. *Schul v. King*, (1946), (Ohio) 70 N. E. 2d 378.

See also *People v. Friedman* (1940), 16 N. Y. S. 2d 925, at page 929, in which the court says that peddling and hawking are lawful uses of the street.

(3) To protect the public from the distribution of obscene or lewd literature. Here again the danger would be just as potential as a result of sales on streets outside of the restricted area, and therefore it cannot be contended that the ordinance was passed for this purpose.

(4) To promote the general welfare by preventing uninvited conversation with strangers. If this is what the city fathers had in mind, it is difficult to understand again why the prohibition is applicable only to the business district. In disposing of the argument that prohibition of solicitation from doorways of passersby on the sidewalk was justified under the general welfare clause, as heretofore stated, the court in *McKay Jewelers v. Bowron*, *supra*, at page 547 of 122 Pac. 2d, said:

“It is conceivable that some hypersensitive individuals may find this type of solicitation offensive. However, that is not sufficient to justify the prohibition of an otherwise lawful method of conducting a business.”

(5) To prevent congestion of traffic. By the process of elimination, then, the conclusion must be reached that the principal reason for prohibiting the solicitation for magazine subscriptions in the business district is to prevent congestion of traffic. To the extent that it is reasonably necessary for the safety and general welfare of the citizens using the streets regulation of traffic is a valid exercise of the police power. However, to prohibit certain activities merely on the pretext that

such prohibition is for the safety and general welfare of the public, when, in fact, there is no reasonable relation between the activity prohibited and the safety and general welfare of the public, is not a justifiable use of the police power, but is an unconstitutional encroachment upon the liberty of the persons restricted. In *Pittman v. Nix* (1943), 152 Fla. 378, 11 So. 2d 791, 144 A. L. R. 1341, the court, in holding invalid an ordinance which prohibited solicitation on the streets of labor union members, said:

“It is impossible to conceive that this single act of soliciting a man on the street, or in a public park for that matter, to join a labor union and pay a membership fee therein, could in any way prevent the free use of the street, the sidewalks or any other public place in the city by the general public. And in considering the validity of ordinances of this general nature, we must not forget that the liberty guaranteed to us by Section 13 of our Declaration of Rights includes freedom of speech and of the press.”

The United States Supreme Court, as stated above, in its recent decision in *Schneider v. State*, *supra*, in striking down municipal ordinances of four different American cities had the following to say about a “hand-bill” ordinance adopted for the purpose of keeping the streets clean:

“As we have pointed out the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the constitution.”

For the same reason the city of Salt Lake shouldn't prohibit a lawful activity, that of soliciting magazine subscriptions, merely for the public convenience of having free flow of traffic. Smooth flow of traffic may be obtained by an ordinance prohibiting the actual stopping and blocking of numbers of persons on the sidewalks, but not by an ordinance prohibiting a lawful activity because it might tend to block traffic in isolated cases.

Paragraph 1 of Section 3652 of the Ordinances makes it unlawful to offer for sale, without obtaining a license, any tickets, coupons or receipts representing value, or redeemable in service, photographs, works of art, and magazine subscriptions in addition to goods, wares and merchandise. Paragraph 2 then provides that goods, wares and merchandise, and magazine subscriptions shall not be sold under any circumstances in the business district. The apparent intention of the board of commissioners in adopting such ordinance being to differentiate between magazine subscriptions and those other items which are not goods, wares and merchandise. In other words, if the phrase "goods, wares and merchandise" is not intended to include photographs, works of art, tickets, coupons or receipts representing value or redeemable in service, and magazine subscriptions, then all of those things may be sold in the business district except magazine subscriptions. Regarding the sales of newspapers there is no problem of interpretation because Section 3647 in defining hawkers specifically exempts those who sell newspapers. Paragraph

12 of Section 3652 states that the provisions of said section shall not apply to persons peddling butter, eggs, fruit, vegetables or poultry raised or produced by themselves so long as they register in the office of the license assessor in Salt Lake City. Therefore upon careful reading of the above sections of the ordinance it is discovered that when properly licensed or registered the following activities may be carried on in the business district: sale of newspapers, photographs, work of art, tickets, coupons and receipts representing value, or redeemable in service, and farm produce raised or produced by the person selling; while on the other hand the following activities, even though licensed, may not be carried on in the business district: sale of magazine subscriptions, goods, wares, merchandise and farm products not produced or raised by the seller. This interpretation is based upon the premise that "goods, wares and merchandise" as used in paragraph 2 of Section 3652 does not include tickets, coupons, receipts, etc.

Definitions in Webster's New International Dictionary, Second Edition, are as follows:

**Goods:** wares; commodities; chattels; in the English Sale of Goods Act (56 & 57 Vict. c. 71; (1893) goods include all chattels personal other than things in action and money.

**Wares:** articles of merchandise; the sum of articles of a particular kind or class; style or class of manufactures; goods; commodities; merchandise.

**Merchandise:** the objects of commerce, whatever is usually bought or sold in trade; goods; wares.

In the hearing below on the demurrer it was stipulated that the Board of Commissioners granted permission to street photographers to carry on their business on the ground that they were not selling goods, wares or merchandise, but rather were selling a service not included in the prohibition of the ordinance, thereby indicating the meaning which said Board of Commissioners intended to give the words "goods, wares and merchandise." If the sale of a coupon entitling one to a photograph is a service, then so also is the sale of a ticket entitling one to a sightseeing tour, and the sale of a magazine subscription services and they should all be classified together, and distinct from "goods, wares and merchandise."

Section 81-6-5, Utah Code Annotated, and the Uniform Sales Act define the word "goods" as follows:

"Goods" includes all chattels personal, other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

Section 3661, Revised Ordinances of Salt Lake City, 1944, defines a merchandise broker as one who

"engages in the business of buying, selling or negotiating for the purchase or sale of meats, provisions, produce, hay, grain, flour, goods, lumber, wares, merchandise, drugs, medicines, jewelry or precious metals."

There is no positive statement in any of the definitions above quoted that brings these coupons, tickets,

receipts, magazine subscriptions, etc., within the meaning of the words “goods, wares and merchandise.” In *People v. Finkelstein*, 9 N. Y. S. 2d 941, the defendant who had been arrested for selling on the street a pamphlet entitled “John L. Lewis Exposed,” was convicted of violating an ordinance prohibiting the sale of merchandise on the street without a license. The ordinance specifically exempted newspapers and magazines from the prohibition. The reviewing court in reversing the judgment of conviction held that the pamphlets, as well as newspapers and magazines, were not included in the term, “merchandise.”

If, then, the court is convinced that tickets, coupons, receipts, etc., are not within the meaning of the words “goods, wares and merchandise,” and that the ordinance makes no prohibition against selling them on the streets of the business district, while it expressly excludes the sale of orders for magazine subscriptions, then there is unreasonable discrimination. As regards the sale of newspapers, the board of commissioners has clearly differentiated that activity from that of selling magazine subscriptions. So far as the purpose of relieving the sidewalks of traffic congestion is concerned, is there any reasonable basis for such differentiation? For purposes of classifying mail matter, newspapers and other periodical publications which are issued at stated intervals are classified together as second class mail. Federal Code Annotated, Vol. 9A, Title 39, Section 224. The National Encyclopedia defines “newspaper” as

“A publication containing chiefly news of

current events, feature articles and advertising, and issued at fixed periods.”

Bouvier’s Law Dictionary defines newspapers as

“Papers conveying news, printed and distributed periodically.”

The State of Utah has classified editors of newspapers and editors of periodicals together in Section 48-0-10, Utah Code Annotated, 1943, in listing those exempt from jury service. And in regulating the hours during which children may perform any work, Section 14-6-16 provides that boys over the age of 10 years may engage in the distribution of newspapers, magazines, periodicals or hand bills on fixed routes in residential districts, thereby indicating the policy of the state legislature in classification of newspapers and magazines together in the matter of distribution. Furthermore, in Section 42-3-2 newspapers and periodicals are classed together in listing the industries required to be reported upon by the department of publicity and industrial development to the governor. Also Section 103-38-11 states:

“Any person who willfully states, conveys, delivers or transmits, by any means whatsoever, to the manager, editor, publisher or reporter of any newspaper, magazine, periodical or serial for publication therein, any false or libelous statement concerning any person, and thereby secures actual publication of the same, is guilty of a misdemeanor.”

again indicating the intention of the legislature of the State of Utah to classify magazines with newspapers,



all of which indicates that Salt Lake City has gone beyond its constitutional powers in discriminating between the sale of newspapers and magazine subscriptions.

Appellants allege and respondents by demurring admit that appellant and his agents, employees and representatives conducted their business on the streets in a very orderly, quiet manner. The question of magazine stands or racks on the sidewalks is not involved. As a general rule the salesman approaches just one person at a time and invites a conversation. If the prospective customer indicates that he doesn't wish to stop for a conversation, the solicitor thanks him and presses the matter no further. If the person stops and indicates a willingness to talk to the salesman the latter suggests that they step back off the middle of the sidewalk, either against the buildings or at the curb between the parking meters in order to keep the way clear for the pedestrian traffic. The conversation is a direct solicitation for a magazine subscription and either a sale is made or the person solicited goes on his way. This harmless activity, according to the ordinance, is unlawful in the business district of Salt Lake City. In comparison, consider the newsboy of whose methods judicial knowledge may be taken. He shouts the headlines, and thrusts his paper in front of passersby, and oftentimes joins one or two others in ganging up on the same customer at the same time; and yet it is perfectly legal for him to do so. The methods of the magazine salesman are more similar to those of the salesmen of tickets for sightseeing tours. The latter

approaches the prospective customer and tries to talk him into purchasing a ticket for one or many of the various tours provided by his company. Many times a rather long conversation takes place, and there is just as much tendency, if any, to block the traffic on the sidewalk as there is by the magazine salesman. And, compared with the street photographer, so far as blocking traffic is concerned, there is not as much danger of it from selling a magazine subscription as from the activities of the street photographer who stands in the middle of the sidewalk to snap a picture and who stops his customer for the purpose of selling him a coupon entitling him to receive the picture when it is developed. Yet the ordinance doesn't prohibit this activity for the reason that it isn't the sale of "goods, wares and merchandise." All these activities are permitted, but when it comes to the magazine salesman, the ordinance makes his soliciting upon the streets a criminal offense. There is no reasonable basis for such discrimination.

The City of Los Angeles attempted by a special ordinance to prohibit photographers from conducting their business on the streets of the city. The ordinance made it unlawful to sell any coupon, tickets, receipt or matter relating to a photograph taken of passersby on the street. The court in *Portnoy v. Hohman* (1942), 50 Cal. App. 2d 22, 122 Pac. 2d 533, struck down the ordinance as being discriminatory against street photographers in favor of those selling any other kind of tickets, such as tickets to ball games, theaters, shows,

and the distribution of handbills pertaining to these things. The court said at page 534 of 122 Pac. 2d:

“Upon its face the ordinance sets up an arbitrary and unreasonable classification of persons soliciting sales and distributing advertising matter upon the public streets, not based upon any natural or constitutional difference, and therefore violates the constitutional guaranties of equal protection of the law against deprivation of property without due process of law.”

Not far afield is the case of *Eden vs. People*, 161 Ill. 296, 43 N. E. 1108, involving a Sunday closing ordinance requiring all barber shops to close their doors to business on Sunday. The court in striking the ordinance down as discriminatory and a violation of the due process clause of the Constitution said at page 309 of 161 Ill.:

“If the public welfare of the state demands that all business and all labor of every description, except works of necessity and charity, should cease on Sunday, the first day of the week, and that day should be kept as a day of rest, the legislature has the power to enact a law requiring all persons to refrain from their ordinary callings that day. (*Cooley’s Const. Lim.* 725) All will then be placed on a perfect equality, and no one can complain of an unjust discrimination. But when the legislature undertakes to single out one class of labor harmless in itself, and condemns that and that alone, it transcends its legitimate powers, and its action cannot be sustained.”

The recent case of *Gronlund v. Salt Lake City* (1948) — Utah —, 194 Pac. 2d 464, decided by the

Utah Supreme Court held a similar Sunday closing ordinance discriminatory and invalid because it attempted to differentiate between the sale of different classes of goods as being more of an emergency type than others, or more necessary to the sustenance of life. The court pointed out how ridiculous it was to say that smoking tobacco was necessary and butter was not. In principle the basis for differentiation between selling magazine subscriptions and selling newspapers, tickets, coupons and receipts is just as unreasonable as the distinctions attempted in the Sunday closing ordinance.

Appellant admits that the use of the street or sidewalk for business purposes is subordinate to the use of the general public for travel. Many cases hold that ordinances prohibiting the placing of goods, wares and merchandise on the sidewalks, or the placing of a stand, or the stopping of a wagon or push cart for the purpose of displaying goods, wares, or merchandise are valid as applied to activities that in fact block the traffic in any way. See *Com. v. Ellis* (1893), 158 Mass. 555, 33 N. E. 651 (concerning a stationary object); *State v. Messonlongitis* (1898) 74 Minn. 165, 77 N. W. 29 (prohibiting the exposing of goods on the sidewalks an unreasonable time); *Shelton v. Mobile* (1857) 30 Ala. 540, 68 Am. Dec. 143 (prohibiting the sale of poultry, meat, fish and game); *Denver v. Girard* (1895), 21 Colo. 447, 42 Pac. 662 (regarding a stand on the street); and *House Wives League v. Indianapolis* (1933), 204 Ind. 685, 185 N. E. 511 (pertaining to stands for the sale of produce and other articles).

In *State v. Barbelais* (1906), 101 Me. 512, 64 Atl. 881, the court in sustaining an ordinance requiring a permit to carry on a trade or business in a public street, said:

“It did not mean that one person could not make a sale of any article to another person on the street, as a result of private negotiation, but that it did mean that a person should not offer articles for sale to the public in a public manner, either from a permanent stand or from a cart pushed or driven along the street.”

Likewise, in *People v. Dmytro* (1937), 280 Mich. 82, 273 N. W. 40, 111 A. L. R. 128, the court upheld an ordinance prohibiting “curb service,” but recognized the right of peddlers and hawkers to sell their wares, because they keep moving along the street, and don’t stop in one place and congest traffic. Appellant suggests that the case of *Chicago v. Rhine*, *supra*, relied upon by the respondents, is in the same class as the last above cited cases. It appears from the statement of facts in the report of the court’s opinion that the defendant was charged with “exposing for sale, magazines in front of 22 South Clark Street,” indicating that the case involved a stand, cart, or something of a permanent, physical nature from or upon which the defendant was displaying and selling his magazines.

Appellant also attacks the ordinance in question on the ground that it completely prohibits the use of the streets in the business district by solicitors for magazine subscriptions, when the general statutory law from which the city derives its power merely grants the power

to regulate. Section 15-8-29, Utah Code Annotated, 1943, provides as follows:

“They (Board of Commissioners) may regulate merchandising and sales upon the streets, side walks and public places.”

The power to regulate does not included the power to prohibit. So held the Supreme Court of the State of Florida in *Quigg v. State* (1922), 93 So. 139, 84 Fla. 164, in striking down an ordinance which prohibited jitneys on certain streets where the statute gave the city power to regulate only; the court said:

“Nor does the welfare clause authorize a prohibition of use when such vehicles are not shown to be inherently dangerous to those who travel the streets. *Curry v. Osborn*, 76 Fla. 39, 79 So. 293, 6 A.L.R. 108. If they are dangerously operated, that can be remedied by proper regulations, even to the extent of exclusion from use of the streets for not observing permissible regulations, that may be enforced in the interest of public safety and convenience.”

In *Chicago v. Schultz* (1930), 341 Ill 208, 173 N. E. 276, the City of Chicago had passed an ordinance prohibiting the distribution or handing out of handbills, cards, pictures or advertising matter upon the public streets. The grants of power to the city by the state legislature included the power to regulate the use of its streets generally, and specifically to prohibit the throwing of offensive matter in the streets, the posting of handbills upon the streets, and the exhibition or carrying of handbills upon the sidewalks. The defendant was

convicted of distributing handbills, and the reviewing court in reversing the judgment held that the specific power to prohibit distribution of handbills was not included in the statutory grants. The court at page 277 of 173 N. E. said:

“Therefore if the city has authority to pass such an ordinance it must be under its power to regulate streets (clause 9) or under its general police powers delegated by clause 66, and it must be a reasonable regulation tending in some degree toward the prevention of offenses or preservation of public health, morals, safety or welfare . . . Statutes granting power to municipal corporations are strictly construed, and any fair and reasonable doubt as to the existence of the powers must be resolved against the municipality . . . Although this power of regulation has been conferred upon the city council, the legislature has not specified the precise manner in which it shall be exercised, and therefore the reasonableness of the exercise of the power by the council is open to inquiry by the courts.”

Then the court points out that the ordinance is so broad that it would prohibit the handing by a person of his card or picture to another and would even prevent the sale or distribution of newspapers because they contained advertising matter. In condemning this type of prohibition the court said further:

“Laws which attempt to regulate and restrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty . . . .The ordinance is not a reasonable exercise of its police powers. Its

strict enforcement would unreasonably hamper persons in the conduct of their affairs.”

Should the prohibition in the case at bar be considered to be a regulation pursuant to the Utah statute quoted above, it is still subject to the requirement that it be reasonable. In discussing the power of a city to restrict hacks, etc., to certain parts of the city, Tiedman on Limitation of the Police Power at page 312 says:

“But the prohibition as to locality must be reasonable, in order that it may not offend the constitutional limitations. If the area in which the prosecution of a useful trade is prohibited is so extensive that it amounts to a practical prohibition of the trade the regulations will be unconstitutional.”

It is submitted that even though Section 3652 permits solicitation of magazine subscriptions in some parts of the city, it is still unreasonable since it prohibits the activity in the only part of the city where it can be carried on profitably, and, therefore, it practically amounts to a complete prohibition of the trade.

**IV. Assuming that Section 3652, Revised Ordinances of Salt Lake City 1944, is valid on its face, then the discriminatory enforcement of the ordinance is unlawful and should be enjoined.**

Under this point appellant, for the sake of argument, assumes that Section 3647, exempting newsboys from that class known as peddlers and hawkers, is a valid classification, and that the prohibition of Section 3652 is valid on its face in that it applies to any kind of sale whatsoever in the business district, and that the



phrase "goods, wares and merchandise," includes tickets, coupons, receipts, etc. The section then would place a flat prohibition against any sales whatsoever on the streets of the business district except the sale of newspapers.

The complaint alleges that in spite of the existence of Section 3652 and the fact that the respondents have enforced it against appellants and his agents, employees and representatives, the respondents have consistently permitted the activities of others in the same class to sell tickets, coupons, receipts and pamphlets on the streets of Salt Lake City's business district. It was admitted below by the respondents in the hearing on the demurrer that salesmen for local transportation companies without interference by the police or local authorities sell on the busiest corners of the business district tickets or coupons to tourists entitling them to sightseeing tours of the city or surrounding points of interest. By stipulation, as noted above, it was also established that the board of commissioners by written permission has attempted to waive the prohibition of the section in the case of street photographers so as to permit them to sell coupons entitling the purchasers thereof to photographs taken by the photographers right in the middle of the sidewalk; and that the local police to not enforce the ordinance against them; yet there is absolutely no provision in the ordinances whereby the Board of Commissioners reserved to themselves the right to waive the restriction in favor of anyone other than owners of abutting property, and these pho-

tographers do not come within that class. Appellant alleges further that certain persons who call themselves "Jehovah's Witnesses" sell a magazine known as the "Watchtower" on the streets of the business district without any interference by the police of local authorities. In addition to these activities the court below took judicial notice of the fact that there have been at various times ticket offices or stands erected on the streets of the business district where tickets to rodeos and shows have been sold to the passing public, also without any interference by the police or respondents. Furthermore appellant now asks this court to take judicial notice of the fact that during the summer months ice cream vendors have with impunity pushed carts up and down the streets of the business district, stopped them temporarily and sold ice cream to passersby. It is also common knowledge that for many years such service organizations as the Veterans of Foreign Wars, and Disabled Veterans have sold "poppies" through volunteer agents on the streets of the business district with nothing but encouragement from local authorities and respondents. Yet for some reason unknown to this appellant as soon as he or his agents, employees and representatives proceeded to sell magazine subscriptions on the sidewalks of the business district respondents saw to it that they were stopped by arresting them and charging them with the violation of Section 3652. Such is a flagrant discrimination in the enforcement of the ordinance.

The decision of the lower court in sustaining the

demurrer and dismissing appellant's complaint asking for a permanent injunction restraining such discriminatory enforcement was that the failure of police officers to apprehend and prosecute one thief is not available as a defense to a prosecution against another thief that was apprehended and prosecuted. Appellant agrees that such failure is no defense to a criminal prosecution, but contends that that is no argument against the granting of injunctive relief where there is a clear intentional discrimination on the part of public officials in the enforcement of a criminal ordinance. In support of appellant's contention several cases are hereinafter cited and quoted.

*Wade v. City and County of San Francisco* (1947), — Cal. App. —, 186 Pac. 2d 181, a case practically identical with the one at bar, was recently decided by the California court of appeals. San Francisco had adopted an ordinance prohibiting solicitation for the sale of any magazine or periodical for future delivery, or the sale of any tangible personal property to be delivered to the purchaser thereof at a subsequent time. Plaintiff, a solicitor for magazine subscriptions, sought an injunction against the discriminatory enforcement of the ordinance. He alleged that others with impunity were violating the ordinance, and that the police and city officials had knowledge of such violations. The appellate court in reversing the lower court's decision sustaining a demurrer to the complaint, at page 182 of 186, Pac. 2d, said:

“The plaintiffs by these allegations bring

their case within the principle first announced in *Yick Wo. v. Hopkins*, 118 U. S. 156, 6 S. Ct. 1064, 30 L.Ed. 220, and recently followed by the Supreme Court of this state in *Brock v. Superior Court*, 12 Cal. 2d 605, 610, 86 P. 2d 805. The latest statement of that principle that has come to our attention is found in *Glicker v. Michigan Liquor Control Commission*, 6 Cir., 160 F. 2d 96. The court in that case reviewed the decisions of the United States Supreme Court on the subject and reiterated the rule that the intentional and arbitrary discrimination in the enforcement of a statute fair on its face is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States which entitles the person discriminated against to relief in the courts.

“Respondents argue that mere lax enforcement of a law or ordinance violates no constitutional rights, This is a correct statement of the law, but appellants allege more than mere laxity of enforcement. They plead that the ordinance is enforced against them and no others ‘with intent to discriminate against plaintiffs and plaintiffs’ said business.’ This brings them squarely within the rule announced in *Glicker v. Michigan Liquor Control Commission* supra; *Snowden v. Hughes*, 321 U. S. 1, 11, 64 S. Ct. 397, 88 L. Ed. 497; and *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U. S. 350, 352, 38 S. Ct. 495, 62 L. Ed. 1154. In each of those cases the distinction between mere laxity of enforcement and intentional or purposeful discrimination is recognized and it is held that while mere laxity of enforcement, although it may result in the unequal application of the law to those who are entitled to be treated alike, is not a denial of

equal protection in the constitutional sense, it is otherwise in the case of deliberate or intentional discriminatory enforcement which is a denial of the equal protection guaranteed by the constitution. While we are fully aware that proof frequently falls short of pleading appellants by their pleading have stated a cause of action which if proved will entitle them to relief and for the purpose of this appeal respondents by their demurrer have admitted the truth of the pleaded facts.”

As appears from the above quotation the Wade case cited and followed the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220, which arose out of an ordinance in the City of San Francisco prohibiting the further use of frame buildings for steam laundries, except in cases where the board of commissioners granted a special permit. Petitioners and all other Chinese laundry operators were denied permits, while the commissioners consistently granted permits to those operators of the caucasian race. The court at page 373 of 118 U. S. in directing the lower court to discharge the prisoners who had been arrested for violation of the ordinance, denounced the discriminatory enforcement as follows:

“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. . . . The

discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged."

In *Glicker v. Michigan Liquor Control Commission* (1947), 6 Cir., 160 Fed. 2d 96, also cited by the Wade case the court held that the plaintiff who had been consistently discriminated against by the liquor commission in revoking her license to sell liquor was entitled to an order directing the defendant commission to renew her license.

In the case of *Hague v. C. I. O.*, supra, Jersey City had adopted an ordinance requiring anyone who intended to conduct a public meeting in any public place in the city to register with the director of public safety and obtain a permit so to do from him. Representatives of the plaintiff organization applied for a permit which was denied, while those who championed causes dear to the hearts of the city fathers were granted permits. Plaintiff was granted an injunction which enjoined the defendants from abridging plaintiff's right to hold meetings unless defendants should refuse everybody such right. The appellate court, in affirming, modified the decree so as to enjoin the defendants from refusing to the plaintiff the right to hold meetings regardless of whether or not others were forbidden.

The lower court in the case at bar in its memorandum decision held that these cases of discrimination

in the granting and withholding of permits by administrative bodies or officers are not binding on the court in this case, because here the question of discretion of some such body or officer is not involved and it is merely a question of failure on the part of the police officers of the respondent city to enforce a flat prohibition equally against all violators. Appellant admits there is a technical difference between discrimination on the part of an administrative officer who has been given discretion within limits, and discrimination by a police officer who has no discretion but is by law supposed to enforce the law against everybody equally. However, as a practical matter the result is the same. Appellant is in just the same disadvantageous position as if the chief of police had the power by the ordinance to grant or withhold permits and without sufficient reason discriminated against appellant by refusing to grant him a permit. Appellant insists as did the court in the Wade case that an intentional and purposeful discrimination as distinguished from mere laxity of enforcement is a denial of equal protection guaranteed by the Constitution.

The Wade case is not alone. It is supported by the case of Covington v. Gausepohl (1933), 250 Ky. 323, 62 S. W. 2d 1040. The City of Covington had adopted an ordinance prohibiting the placing of boxes, barrels, baskets or merchandise upon the sidewalks of the city. The city enforced the ordinance against the plaintiff and other storekeepers but allowed hucksters and farmers to place with impunity their goods, wares and mer-

chandise on the sidewalks while soliciting trade. Upon suit brought by the plaintiff storkeeper the lower court issued an order perpetually enjoining the enforcement of the ordinance. Upon appeal by the city, the appellate court, in sustaining the lower court's decision, modified the injunction as follows:

“Instead of enjoining all enforcement of the ordinance involved, the court should only have enjoined the city from making discriminations in its enforcement, and this injunction is now so modified and the judgment is affirmed.”

As appears in the opinion the Kentucky court also relies on the Yick Wo case and after quoting a part of the opinion quoted above, said:

“The city would be commended for its efforts to keep its sidewalks clear of obstruction if it acted impartially, but it cannot be allowed to discriminate.”

Other cases, though not entirely in point, announcing the same general principle that a law enforced in such a way as to affect a discrimination against a part of the community or public is unlawful even though fair on its face, are *Dobbins v. Los Angeles* (1904), 49 L. Ed. 169, 195 U. S. 233, 25 S. Ct. 18; *Clark v. City of Burlington*, 101 Vt. 391, 143 Atl. 677; cited by *McMillan on Municipal Corporations*, Vol. 2, page 939, note 1; *Louisville & N. R. Co. v. Bosworth* (1915), 230 Fed. 191, at page 206; and *Walker v. City of Birmingham* (1927), 112 So. 823, 216 Ala. 206.



## CONCLUSION

The lower court erred in sustaining the general demurrer, and respondents should be required to disprove the allegations of the complaint or else be directed to cease interfering with appellant, his agents, representatives and employees and their business.

The action of the respondents in arresting and threatening to arrest appellant, his agents, representatives and employees is unlawful in that it is in derogation of their rights of freedom of speech and freedom of the press, and also for the reason that it is an interference with the free flow of interstate commerce. Section 3652 of the Ordinances which prohibits appellant's activities in the business district is unconstitutional for the same reasons. Section 3652 especially when read together with Section 3647 exempting newsboys, is also invalid for the reason that it makes an unreasonable discrimination against magazine subscription solicitors in favor of salesmen of newspapers and all other types of tickets, coupons, and receipts. And should the Court hold that Section 3652 is intended to apply to the sale of all types of tickets, coupons and receipts as well as to the solicitation of magazine subscriptions, then although the section is fair on its face, the intentional and purposeful discrimination in the enforcement of said section against appellant and his magazine salesmen in favor of salesmen of "Watchtower," tickets for sightseeing tours, photograph coupons, receipts, ice

cream, “poppies” and rodeo tickets is unlawful and should be enjoined. The case should be remanded for further proceedings.

Respectfully submitted,

ROBERT S. RICHARDS and  
T. QUENTIN CANNON,

*Attorneys for Appellant.*