

1948

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

Utah Supreme Court

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E. R. Christensen; Homer Holmgren; A. Pratt Kesler; Assistant City Attorneys;

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## Recommended Citation

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IN THE SUPREME COURT <sup>W LIB</sup>  
of the  
STATE OF UTAH

RALPH D. SLATER, dba  
INTERNATIONAL PUBLISHERS  
SERVICE,

*Appellant,*

vs.

SALT LAKE CITY, a Municipal Cor-  
poration, and L. C. CROWTHER, as  
Chief of Police of Salt Lake City, Utah,

*Respondents.*

RESPONDENT'S BRIEF

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*Attorneys for Respondents*

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DEC 6 1948

# INDEX

	Page
STATEMENT OF FACTS .....	1, 2, 3
RESPONDENTS' ARGUMENT .....	3
POINTS TO BE ARGUED .....	3, 4

## ARGUMENT

I. The City has power and the duty to enact ordinances regulating sales on its highways and sidewalks .....	4, 5, 6
II. The restriction by the City Ordinance of Sales in a Congested Business Area is not an Infringement on the right of freedom of Speech and of the Press.....	7, 8, 9, 10, 11, 12, 13
III. The restriction of a certain Area from the Business Of the Sale of Magazines for Private Gain is not a Burden on Interstate Commerce .....	13, 14, 15, 16, 17
IV. Section 3652 of the Revised Ordinances of Salt Lake City, Utah, 1944, is not Void for Want of Unlawful Discrimination or Proper and Lawful Classification.....	17, 18, 19, 20, 21, 22
V. The Mere Lax Enforcement of Section 3652 of the Revised Ordinances of Salt Lake City, Utah, 1944, by Respondents is not a Denial of Equal Protection in a Constitutional Sense .....	22, 23, 24, 25, 26, 27
CONCLUSION .....	27, 28

## CASES, TEXTS AND STATUTES

### CASES

Biffer v. City of Chicago, 278 Ill. 562, 116 N. E. 182.....	20
Broadbent, et. al. v. Gibson, 140 Pac. 2d 939.....	18
Cantwell v. Connecticut, 310 U. S. 305, 84 L. Ed. 1213.....	12
Churchill v. Albany, 56 Or. 442, 133 P. 632, Ann. Cas. 1915A, 1094 .....	21
City of Blue Island v. Kozul, 41 N. E. 2d 515.....	23
City of Chicago v. Clark, 359 Ill. 374, 194 N. E. 537.....	20
City of Chicago v. Rhine, 2 N. E. 2d 905.....	12, 19, 22, 23
City of Chicago v. McKinley, 176 N. E. 261 .....	6, 20
City of Denver v. Girard, 42 Pac. 662.....	27
Commission v. Gardner, 19 Atl. 554, 148 U. S. 774.....	17
Commonwealth v. Abrahams, 156 Mass. 57, 30 N. E. 79.....	20
Dorwart v. City of Jacksonville, 333 Ill. 143, 164 N. E. 129.....	20
Ex. Parte Hogg, 156 S. W. 931.....	17
Ferguson Coal Co. v. Thompson, 343 Ill. 20, 174 N. E. 896.....	20
Fuller Brush Co. v. Town of Green River, 60 Fed. 613.....	14, 15
Glicker v. Michigan Liquor Control Com. 160 Fed. 2d 96.....	25
Greene v. City of San Antonio (Tex. Civ. App.) 178 S. W. 6.....	21
Green River v. Fuller Brush Co., 65 Fed. 2d 112, 88 A.L.R. 177 .....	15, 16
Hague v. C. I. O., 307 U. S. 496, 83 L. Ed. 1423.....	7, 12
Hannan v. City of Haverhill, 120 Fed. 2d 87.....	23
International Text Book Co. v. City of Auburn, 155 Fed. 986.....	16, 17

# INDEX—(Continued)

	Page
Kolman v. St. Louis, 289 S. W. 838.....	18
Lovell v. City of Griffin, 303 U. S. 444.....	7, 12
Melton v. City of Paris, 333 Ill. 190, 164 N. E. 218.....	20
Metropolis Theater Co. v. City of Chicago, 246 Ill. 20, 92 N. E. 597, 228 U. S. 61, 33 S. Ct. 441, 57 L. Ed. 730.....	20
Myers v. Baker, 12 N. E. 79.....	17
Nebbia v. People, 291 U. S. 502, 78 L. Ed. 940.....	18
Packer Corporation v. State of Utah, 285 U. S. 52.....	16
People v. Clean Street Co., 225 Ill. 479, 80 N. E. 298, 9 L. R. A. (N.S.) 455, 116 Am. St. Rep. 156.....	21
People v. Corn Products Refining Co., 121 N. E. 574.....	6
People v. Finkelstein, 9 N. Y. Sup. 2d 941.....	22
People v. Keir, 78 Mich. 98, 43 N. W. 1039.....	20
People v. Thompson, 173 N. E. 137.....	6, 21
People v. Wolper, 350 Ill. 461, 183 N. E. 451.....	21
Philadelphia v. Brabender, 201 Pa. 574, 51 A. 374, 58 L. R. A. 220	21
Rosa v. City of Portland, 86 Or. 438, 168 P. 936, L. R. A. 1918 B, 851 .....	21, 22
Saia v. People, 68 Sup. Ct. 1148 .....	10, 24
Savage v. Jones, 225 U. S. 501, 56 L. Ed. 1182.....	16
Schneider v. Irvington, 308 U. S. 147, 84 L. Ed. 155.....	7, 9, 23
State v. Dolman, 13 Ida. 693, 92 Pac. 995.....	18
State v. Mason, 94 Utah 501, 78 Pac. 2d. 920, 117 A.L.R. 330.....	18
State v. Reynolds, 58 Atl. 755.....	17
Stephenson v. Binford, 287 U. S. 251, 77 L. Ed. 288.....	12
Stewart Motor Co. v. City of Omaha, 235 N. W. 332.....	18
Sylvania v. Hilton, 51 S. W. 744, 2 L.R.A.N.S. 483.....	27
Town of Green River v. Bunker, 58 Pac. 2d 456, 300 U. S. 638, 81 L. Ed. 854 .....	14
Valentine v. Chrestensen, 316 U. S. 52, 96 L. Ed. 1262.....	11, 12
Wade v. City and County of San Francisco, 186 Pac. 2d 181.....	26
Wade v. Nunnally, 19 Tex. Civ. App. 256, 46 S. W. 668.....	6, 21
West v. City of Waco, 116 Tex. 472, 294 S. W. 832.....	21
Williams v. Arkansas, 217 U. S. 79, 54 L. Ed. 673.....	17
Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220.....	17, 25

## TEXTS

23 Corpus Juris, Sec. 1992, p. 165.....	19
Dillon on Municipal Corporation (3rd Ed.) Sec. 327.....	27

## STATUTES

### Utah Code Annotated 1943:

Sec. 15-8-29 .....	4
Sec. 15-8-30 .....	4
Sec. 15-8-11 .....	5
Sec. 15-8-23 .....	5
Sec. 15-8-39 .....	5
Sec. 15-8-80 .....	5
Sec. 15-8-84 .....	5, 6

### Revised Ordinances of Salt Lake City, Utah, 1944:

Sec. 3652 .....	1, 2, 4, 17, 18, 22, 25
-----------------	-------------------------

Sec. 3722 .....	13
-----------------	----

# In the Supreme Court of the State of Utah

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RALPH D. SLATER, dba  
INTERNATIONAL PUBLISHERS  
SERVICE,

*Appellant,*

vs.

SALT LAKE CITY, a Municipal Cor-  
poration, and L. C. CROWTHER, as  
Chief of Police of Salt Lake City, Utah,

*Respondents.*

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Case No.  
7222

## STATEMENT OF FACTS

This appeal is taken from an order of the Honorable A. H. Ellett, one of the Judges of the Third Judicial District Court of Salt Lake County, State of Utah, sustaining respondents' demurrer to and dismissing appellants' complaint, which complaint is set forth in full in appellant's brief on pages 2 to 12 thereof inclusive.

Appellant's complaint sought to restrain respondents from enforcing certain provisions of Section 3652 of the Revised Ordinances of Salt Lake City, Utah, 1944, against himself and his agents. The pertinent parts of the said ordinance as it pertains to the case at bar reads 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 in 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."

Appellant contends that the court erred in sustaining the demurrer to and ordering the dismissal of his complaint substantially for the reason that Section 3652 of the Revised Ordinances of Salt Lake City, Utah, 1944, is:

1. An infringement on the right of freedom of speech and of the press.
2. A burden upon inter-state commerce.

### 3. Void because of discrimination.

And for the further reason that respondents were discriminatory in enforcing the provisions of said ordinance.

## **RESPONDENT'S ARGUMENT**

It is respondents' position that appellant did not set forth facts sufficient in his complaint on file herein to warrant the trial court granting the relief therein prayed for and that the trial court was justified in entering its order sustaining respondents' demurrer and ordering the dismissal of appellant's complaint. This appeal is on the judgment roll only. However, the trial court did prepare and file a memorandum decision which is a part of this judgment roll.

Respondents in advancing their position in the foregoing matter and in answer to appellant's brief heretofore filed with your Honorable Court herein sets forth their argument under five points, each of which will be set forth separately as follows:

## **POINTS TO BE ARGUED**

I. THE CITY HAS POWER AND THE DUTY TO ENACT ORDINANCES REGULATING SALES ON ITS HIGHWAYS AND SIDEWALKS.

II. THE RESTRICTION BY THE CITY ORDINANCE OF SALES IN A CONGESTED BUSINESS AREA IS NOT AN INFRINGEMENT ON THE RIGHT OF FREEDOM OF SPEECH AND OF THE PRESS.

III. THE RESTRICTION OF A CERTAIN AREA FROM THE BUSINESS OF THE SALE OF MAGAZINES FOR PRIVATE GAIN IS NOT A BURDEN ON INTERSTATE COMMERCE.

IV. SECTION 3652 OF THE REVISED ORDINANCES OF SALT LAKE CITY, UTAH, 1944, IS NOT VOID FOR WANT OF UNLAWFUL DISCRIMINATION OR PROPER AND LAWFUL CLASSIFICATION.

V. THE MERE LAX ENFORCEMENT OF SECTION 3652 OF THE REVISED ORDINANCES OF SALT LAKE CITY, UTAH, 1944, BY RESPONDENTS IS NOT A DENIAL OF EQUAL PROTECTION IN A CONSTITUTIONAL SENSE.

## ARGUMENT

I. THE CITY HAS POWER AND THE DUTY TO ENACT ORDINANCES REGULATING SALES ON ITS HIGHWAYS AND SIDEWALKS.

The State of Utah has delegated to cities the power to regulate sales and the movement of pedestrians on its streets and sidewalks. Some of these grants by the state to cities are as follows:

“15-8-29. **TRAFFICKING IN STREETS.** They may regulate merchandising and sales upon the streets, sidewalks and public places.” U.C.A. 1943.

“15-8-30. **REGULATION OF TRAFFIC.** They may regulate the movement of traffic on the streets, sidewalks and public places, including the movement of pedestrians as well as of vehicles, and the cars and engines of railroads, street rail-



roads and tramways, and may prevent racing and immoderate driving or riding." U.C.A. 1943.

"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." U.C.A. 1943.

"15-8-23. C L E A N I N G 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." U.C.A. 1943.

"15-8-39. LICENSE OF CERTAIN BUSINESSES. They may license, tax and regulate hawking and peddling, etc. \* \* \* U.C.A. 1943.

"15-8-80. LICENSE FEES AND TAXES. They may raise revenue by levying and collecting a license fee or tax on any business within the limits of the city, and regulate the same by ordinance, etc." U.C.A. 1943.

"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 conveniences of the city and the inhabitants thereof, and for the protection of property therein; etc." U.C.A. 1943.

It is evident from the foregoing grants of power that cities have the power to adopt ordinances tending to promote the general welfare of the public and the use of its streets and sidewalks and the right to regulate the business of sales for personal gain upon its streets and sidewalks and public places. These powers ipso facto carry with them the authority not only to impose reasonable restrictions and regulations but even the power to suppress sales thereon. *People vs. Thompson*, 173 N. E. 137.

In the case of *Wade v. City and County of San Francisco*, 186 Pac. 2d, 181, the court said "that an ordinance prohibiting solicitation on any public street or highway or in any area or doorway or entrance immediately abutting thereon of magazine subscriptions for future delivery is prima facie constitutional."

It is the duty of the city to maintain its streets in such condition that the public should at all times have the unobstructed use thereof. *People v. Corn Products Refining Co.*, 121 N. E. 574.

The city holds title to our public streets in trust for the use and benefit of the public and the public is entitled to use such streets free of obstructions. *City of Chicago v. McKinley*, 176 N. E. 261.

## II. THE RESTRICTION BY THE CITY ORDINANCE OF SALES IN A CONGESTED BUSINESS AREA IS NOT AN INFRINGEMENT ON THE RIGHT OF FREEDOM OF SPEECH AND OF THE PRESS.

The respondents have no quarrel with the statement made by appellant that "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."

The United States Supreme Court has ruled many times upon questions involving these provisions in the constitutions. Appellant relies in his brief upon the decisions handed down in the case of *Schneider v. Irvington*, 308 U. S. 147, 84 L. Ed. 155, and also recite in support of his position the cases of *Lovell v. City of Griffin*, 303 U. S. 444, and *Hague v. C. I. O.*, 307 U. S. 496, 83 L. Ed. 1423.

These are all cases where religion or a private controversy were being aired publicly by the distribution of leaflets or printed mater and where ordinances were in force that required the obtaining of a permit before any such printed matter could be distributed, or where there were provisions to the effect that such leaflets could not be thrown upon the public streets or where the chief of police was delegated unlimited discretion to determine who might or who might not distribute such printed matter.

The cases are well settled that where a question of religion or a private controversy are being presented by printed or spoken word the same may be distributed or spoken in all public places including streets and sidewalks, subject only to any and all reasonable regulations by the local authorities.

The cases are also unanimously in accord that no person has any inherent right to conduct or carry on a private business for his personal gain in a public street and that such private business for gain is at all times subject to local regulation or complete suppression dependent upon the local needs or requirements. This also extends to the selling of magazines or other printed matter upon a public street as a matter of private gain or business.

There can be no doubt from the allegations of appellant's complaint that he was engaging in business for private gain on the public streets of Salt Lake City for paragraphs 8, 9 and 15 of plaintiff's complaint provide in part as follows:

“8. Plaintiff now is and has been, engaged on the public streets and sidewalks in said Salt Lake City, and in areas, doorways and entrances 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.”

“9. \* \* \* 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, \* \* \* 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.”

“15. 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.”

In the case of *Schneider v. Irvington*, *supra*, the court said at page 163, where referring to the ordinance then under attack:

“The ordinance is not limited to those who canvass for private profit; nor is it merely the

common type of ordinance requiring some form of registration or license of hawkers or peddlers. It is not a general ordinance to prohibit trespassing. It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it.”

The same court further on page 165 states:

“We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinances requires.”

The latest United States Supreme Court case decided on the question of freedom of the press and freedom of speech is perhaps the case of *Saia v. People*, decided on June 7, 1948, and reported in 68 Sup. Ct. 1148, a 5 to 4 decision in which the court held a city ordinance void which permitted sound trucks to operate in public places only if they first obtained a permit from the chief of police, the court saying in part with reference to said ordinance that the said ordinance was void for the reason that it provided for no standards prescribed for the exercise of the chief of police's discretion and that the ordinance was not narrowly drawn to regulate the hours or places of use of loud-speakers or the volume of sound to which they must be adjusted. The Saia case is a case involving the use of a sound truck for religious purposes and even under such conditions the court infers that an ordinance would be valid regu-

lating freedom of speech and religion by controlling the hours and the place of discussion permitted and the amount of sound allowed.

On April 13, 1942, the United States Supreme Court sustained an absolute prohibition of commercial advertising on city streets in the case of *Valentine vs. Chrestensen*, 316 U. S. 52, 96 L. Ed. 1262. In that case a regulation of the City of New York prohibited the distribution of commercial handbills on the public streets. The court upheld such measure as a valid exercise of the city's police power, declaring that it did not interfere with the freedom of speech and press guaranteed by the Federal Constitution; and stated:

“This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the

people in fulfillment of the public use to which streets are dedicated. If the respondent was attempting to use the streets of New York by distributing commercial advertising, the prohibition of the code provision was lawfully invoked against his conduct.”

It should also be noted that the case of *Valentine vs. Chrestensen*, *supra*, came after the decisions of *Cantwell v. Connecticut*, 310 U. S. 305, 84 L. Ed. 1213, *Lovell* and *Hague* cases *supra*. So, there is a clear indication that the freedom of the press and speech guarantees of the Constitution apply to non-commercial activities only.

The Supreme Court has also said in the case of *Stephenson v. Binford*, 287 U. S. 251, 77 L. Ed. 288:

“It is well established law that the highways of the State are public property—that their use for purposes of gain is special and extraordinary, which, generally, at least, the state may prohibit or condition as it sees fit.”

In the case of *City of Chicago v. Rhine*, 2 N. E. 2d 905, a case directly in point, and in which case the selling of magazines as a business was prohibited in certain congested districts and an objection was raised that the constitutional right of freedom of speech and of the press was violated by such restriction, the court said at page 909:

“The defendant has not been deprived of any supposed right freely to sell any magazines which are written or published on any subject. The ordinance has merely regulated his business



of making sales on the streets in certain restricted regions in the city. His business has not been suppressed. The business of all others in a like situation and like business has been equally regulated. Such regulation does not run against the grain of the constitution. The ordinance does not prohibit the sale nor the offering for sale of any magazines or any like publications in the city nor interfere with the circulation thereof." (Cites cases)

### III. THE RESTRICTION OF CERTAIN AREAS FROM THE BUSINESS OF THE SALE OF MAGAZINES FOR PRIVATE GAIN IS NOT A BURDEN ON INTER-STATE COMMERCE.

Appellant in his brief under point II of his argument cites several cases holding that cities do not have the power to license or tax inter-state commerce; nowhere in appellant's complaint does he allege that the city did or attempted to exact a license or tax from him for the privilege of engaging in any interstate business or commerce. As a matter of fact Section 3722 of the Revised Ordinances of Salt Lake City, Utah, 1944, as amended, specifically exempts any persons engaging in inter-state business from procuring a license from the city to so engage in such business. In the last paragraph under point II of appellant's argument he says:

"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.”

Under its police power a city has a right to make reasonable regulations for the conduct of any business for the purpose of promoting the peace, health and prosperity of its citizens.

In the case of *Town of Green River v. Bunger*, 58 Pac. 2d 456, which case was appealed to the United States Supreme Court, in 300 U. S. 638, 81 L. Ed. 854, a city ordinance provided that it was unlawful to make a solicitation at any residence within the city for the purpose of obtaining orders for the sale of goods, wares and merchandise without first being invited by the occupant of such residence to make such solicitation. A solicitor was arrested for such offense and the validity of the ordinance was attacked on the grounds that it was a burden on inter-state commerce by restricting the places that could be solicited, but the court held the ordinance valid, and stated at page 463:

“We have in this case no question of the exaction of a license fee or a tax. The ordinance clearly is a local police regulation. We have decided that it has a real relation to the suitable protection of people in their homes, and is reasonable in its requirements. If we are right in our views as to the purpose and reasonableness of the ordinance, it is valid, even though it may incidentally affect interstate commerce. Both federal courts that considered the ordinance were of the same opinion on that question. Fuller Brush

Co. v. Town of Green River, 60 Fed. 613, and Town of Green River v. Fuller Brush Co., 65 Fed. 2d 112, 88 A.L.R. 177. The Circuit Court of Appeals said: 'The ordinance does not purport to interfere in any respect with the Fuller Brush Company's right or privilege of selling and transporting its wares in interstate commerce. It is free to carry on a business of that sort except to solicit orders in the manner specified in the ordinance, and obviously it could do so in many ways other than imposing itself upon and disturbing the residents of the town as prohibited by the ordinance'."

In the case of *Green River v. Fuller Brush Co.*, 65 Fed. 2d 112, the court said:

"It has been uniformly held that while legislative authority may not arbitrarily interfere with private affairs by imposing unusual and unnecessary restrictions upon a lawful business, yet a considerable latitude of discretion must be accorded to the law making power, and if the regulation operates uniformly upon all persons similarly situated and it is not shown that it is clearly unreasonable and arbitrary, it cannot be judicially declared to be in contravention of constitutional right.

"This court has frequently affirmed that the local authorities intrusted with the regulation of such matters, and not the courts, are primarily the judges of the necessities of local situations calling for such legislation, and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably

in excess of any reasonable exercise of the authority conferred.”

And in further holding that the restrictions imposed by local law did not interfere with interstate commerce stated:

“Public notice of the presence of its agents in the town for the purpose of taking orders for appellee’s goods could be given stating when and where such agents could be found, samples of its wares seen, and their use explained and demonstrated, and orders taken.”

Also see *Packer Corporation v. State of Utah*, 285 U. S. 52.

In the case of *Savage v. Jones*, 225 U. S. 501, 56 L. Ed. 1182, the court said:

“The state cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce.”

In the case of *International Text Book Co. v. City of Auburn*, 155 Fed. 986, the court said:

“An ordinance prohibiting the distribution of handbills, etc., in the public streets on the ground, among others, that it controlled annoy-

ing methods of interfering with persons traveling therein, is valid and should be upheld. Laws prescribing a punishment for those who engage in the temporary business of vending within a certain distance of camp meetings or fairs without the consent of those in charge of the said meetings or fairs have been sustained as reasonable police regulations on the ground that they are intended to prevent disturbances." *State v. Reynolds*, 58 Atl. 755, *Meyers v. Baker*, 12 N. E. 79.

In the case of *Commission v. Gardner*, 19 Atl. 554, 148 U. S. 774, the court upheld the validity of a statute prohibiting the sale of foreign and domestic goods, wares and merchandise in a specified county by any person or persons as hawker or peddler, the court reasoning that there can be no interference with inter-state commerce by legislation which erects no barrier at the state line, such regulation being merely a police regulation applicable to all persons whether non-residents or not.

In the case of *Williams v. Arkansas*, 217 U. S. 79, 54 L. Ed. 673, the court upheld the validity of a state law prohibiting drumming and soliciting business for patronage upon railroad trains and premises of common carriers. Also see *Ex. Parte Hogg*, 156 S. W. 931.

IV. SECTION 3652 OF THE REVISED ORDINANCES OF SALT LAKE CITY, UTAH, 1944, IS NOT VOID FOR WANT OF UNLAWFUL DISCRIM-

## INATION OR PROPER AND LAWFUL CLASSIFICATION.

Appellant takes the position that because the city permits the sale of newspapers upon the streets within the district in which the subscription to magazines is prohibited by ordinance, the said ordinance is arbitrary, capricious and provides for unlawful classification. The Utah Supreme Court has passed upon the question of proper and permitted classification in the case of *Broadbent, et. al. v. Gibson*, a Utah case, 140 Pac. 2d 939.

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. *State v. Mason*, 94 Utah 501. 78 Pac. 2d 920, 117 A. L. R. 330.

The legislature has a wide discretion in determining what shall come within the class of permitted activities and what shall be excluded. *Kolman v. St. Louis*, 289 S. W. 838; *Stewart Motor Co. v. City of Omaha*, 235 N.W. 332; *State v. Dolman*, 13 Ida. 693, 92 Pac. 995.

The 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 reasonableness of the regulation, the law must be upheld. *Nebbia v. People*, 291 U. S. 502, 78 L. Ed. 940.

The Illinois Supreme Court has passed directly on this question in the case of *City of Chicago v. Rhine*, *supra*, a 1936 case in which case the court said in discussing the objections to permitting the sale of newspapers and prohibiting the sale of magazines within a restricted district and the lack of reason in establishing restricted zones:

“The defendant contends that the ordinance is unreasonable in that (1) there is no sufficient legal reason why the ordinance should permit the sale of daily newspapers and prohibit the sale of magazines within the restricted territory; and (2) that there is no substantial basis for designating either of the two prohibited areas in which commerce cannot be carried on freely.

(7) It is a matter of common knowledge that the loop and the Wilson avenue districts are severally highly congested areas for travel and transportation, and of this fact we take judicial notice. 23 Corpus Juris, Sec. 1992, p. 165. It doubtless was the thought of the municipal authorities that the indiscriminate sale of articles of merchandise upon the streets in the prohibited territory tended to impede, delay, and obstruct traffic, thereby impairing the legitimate use of the streets. The hampering of traffic movement in the congested areas was a problem presented to the municipal authorities for solution. They were not concerned with the fact that withdrawal of the use of such streets for private gain by street vendors and peddlers might possibly work a hardship in individual cases on those engaged in such commercial pursuits, but realizing it was the city's obligation to arrive at, as nearly as might

be, a practical remedy for the relief of the unfavorable travel situation in those streets, overburdened with traffic, the municipal authorities determined upon this ordinance as an appropriate legal remedy.

(8-11) It is our duty in passing upon the reasonableness of the ordinance to consider the circumstances and conditions existing at the time of its passage and the evils sought to be corrected. *Biffer v. City of Chicago*, supra. Even though we might not agree with the judgment of the municipal body in the passage of such ordinance and think it oppressive, yet if it was within the powers granted the municipality we have no right to disturb the ordinance (*Metropolis Theater Co. v. City of Chicago*, 246 Ill. 20, 92 N. E. 597, affirmed in 228 U. S. 61, 33 S. Ct. 441, 57 L. Ed. 730) unless it is clearly unreasonable. *City of Chicago v. Clark*, 359 Ill. 374, 194 N. E. 537. It is not within the province of the judiciary to set up its judgment as to the necessity and appropriateness of the legislative act so long as the same may not clearly be unreasonable. *Ferguson Coal Co. v. Thompson*, supra; *Dorwart v. City of Jacksonville*, 333 Ill. 143, 164 N. E. 129; *Melton v. City of Paris*, 333 Ill. 190, 164 N. E. 218. Under the special circumstances existing in the loop and the Wilson avenue areas it was not necessary that the ordinance apply to all portions of the city. *City of Chicago v. McKinley*, supra; *Ferguson Coal Co. v. Thompson*, supra; *Commonwealth v. Abrahams*, 156 Mass. 57, 30 N. E. 79; *People v. Keir*, 78 Mich. 98, 43 N. W. 1039.

(12, 13) The defendant earnestly insists that because the ordinance permits the sale of daily newspapers within the prohibited districts the ordinance is thereby unconstitutional. In



taking up this phase of the case we should glance for the moment at the position of the defendant who is attacking the constitutionality of the ordinance. He is seeking to carry out his own private commercial enterprise for his own personal financial profit, on the streets within the loop district, one of the forbidden domains. Although he may have, prior to the passage of the ordinance, pursued his calling on the streets, his use thereof was solely a permissive one. He had no inherent right to operate his business in or upon the streets of the city. *People v. Thompson*, supra; *People v. Wolper*, 350 Ill. 461, 183 N. E. 451; *People v. Clean Street Co.*, 225 Ill. 479, 80 N. E. 298, 9 L. R. A. (N. S.) 455, 116 Am. St. Rep. 156; *Wade v. Nunnally*, 19 Tex. Civ. App. 256, 46 S. W. 668; *Rosa v. City of Portland*, 86 Or. 438, 168 P. 936, L. R. A. 1918 B, 851; *Greene v. City of San Antonio* (Tex. Civ. App.) 178 S. W. 6; *West v. City of Waco*, 116 Tex. 472, 294 S. W. 832. That some one else is given the privilege of selling newspapers (a commodity not within the same class as the article the defendant was exposing for and offering for sale) did not constitute an unconstitutional discrimination against him. The classification made by the city by which daily newspapers were exempt from the operation of the ordinance was valid. *People v. Thompson*, supra; *Rosa v. City of Portland*, supra; *Philadelphia v. Brabender*, 201 Pa. 574, 51 A. 374, 58 L. R. A. 220.

(14, 15) Nor does the ordinance run counter to the Fourteenth Amendment to the Constitution of the United States nor to the cited sections of the State Constitution. The ordinance affected all persons engaged in the same business equally under like conditions. *Churchill v. Albany*, 65 Or. 442, 133 P. 632, Ann. Cas. 1915 A, 1094. Nor

did the ordinance offend against the equality provision of the Constitution. The equality of enjoyment is not within the constitutional guaranty. Such guaranty does not mean that a legislative act will operate alike upon all citizens. The equality of right is the equality guaranty.’’

The case of *Rosa v. City of Portland*, 168 Pac. 936, held that a city ordinance imposing license taxes on peddlers in the city streets except venders of newspapers, farm produce, etc., does not deprive dealers in popcorn, fruits, etc., of any privilege or immunity in violation of the Fourteenth Amendment of the Federal Constitution, since the right to use city streets is not inherent but may be limited or prohibited.

Also see *People v. Finkelstein*, 9 N. Y. Sup. 2d 941, wherein it was held that newspapers and magazines were a proper classification as against other merchandise.

It should also be noted that the case of *City of Chicago v. Rhine*, *supra*, as does the weight of authority, provide that the court may take judicial notice of the congested district or districts within the city.

V. THE MERE LAX ENFORCEMENT OF SECTION 3652 OF THE REVISED ORDINANCES OF SALT LAKE CITY, UTAH, 1944, BY RESPONDENTS IS NOT A DENIAL OF EQUAL PROTECTION IN A CONSTITUTIONAL SENSE.

It was admitted by respondents in the hearing on demurrer that the ordinance was not enforced against

the sect known as Jehovah's Witnesses in the distribution or sale of religious literature, the great weight of authority being to the effect that cities do not have the power or right to prohibit or suppress the distribution or sale of religious literature upon its streets or in public places, but does have the power to impose reasonable regulations thereon.

In the case of *City of Blue Island v. Kozul*, 41 N. E. 2d 515, the court held that a city ordinance requiring peddlers selling or offering for sale goods, wares or merchandise to obtain a license and paying license fees as applied to sale and distribution of magazines and leaflets by a member of Jehovah's Witnesses who distributed the literature as part of her form of worship without financial gain or material profit to herself and not as a means of livelihood is unconstitutional and a violation of the right of freedom of speech and of freedom of the press. The *Rhine* case, *supra*, was referred to and pointed out as an exception to the rule in this case and the case of *Schneider v. Irvington*, *supra*.

The case of *Hannan vs. City of Haverhill*, 120 Fed. 2d 87, was a case involving distribution of books and leaflets by Jehovah's Witnesses on the city streets and the court held:

“The constitutional liberties of a citizen to use streets for purposes of assembly and the interchange of thought on religious, political and other matters are relative not absolute and must be exercised in subordination to the comfort and convenience and in consonance with peace and

good order. A state or municipality may by general and not non-discriminatory legislation regulate the times, places and manner of soliciting upon its streets and of holding meetings thereon and may, in other respects, safeguard the peace, good order and comfort of the community without unconstitutional liberties protected by the Fourteenth Amendment, but the regulations must be appropriate to subject matter regulated.”

Also see 175 S. W. 2d 21. Also see *Saia v. People of the State of New York*, *supra*, a case involving the use of a loud speaker in public places by Jehovah’s Witnesses.

All of the above cases establish the rule that the distributing or selling religious literature is not in the same class as the selling of magazines or books as a private business for personal gain and that a different rule exists for each. The city of Salt Lake City has heretofore arrested members of the Jehovah’s Witnesses’ religious sect for distributing their literature and other publications and selling the same on our public streets and the trial courts have repeatedly held that the city’s power with relation to such religious sects is merely that of regulation and not of suppression as is the rule with a private business being conducted on a public street for personal gain. Nor does appellant contend in support of his position that the city permits other magazine salesmen, who sell for private gain, or salesmen who sell other commodities within the same class as magazines for private gain, to sell their magazines, wares or other commodities upon the public streets of Salt

Lake City with impunity, while at the same time prosecuting appellant for such activity.

The city at the time of the hearing on demurrer, for the purpose of argument, admitted the sale of tickets to centennial events such as rodeos and musicals from a booth located at 2nd South and Main Streets in Salt Lake City, but contended and does again contend that such activities are not in the same class as selling magazines or goods, wares or merchandise, the sale of which are prohibited by the provisions of Section 3652 of the Revised Ordinances of Salt Lake City, Utah, 1944, and that such exceptions as are made in said ordinance are proper classifications within the power of the city legislative body to create and establish by ordinance, based on the existing facts then before and considered by them at the time of adopting such ordinance.

Let us assume, however, for the purpose of argument that the appellant is right in his contention that the city has been lax in the enforcement of certain provisions of Section 3652 of the Revised Ordinances of Salt Lake City, Utah, 1944.

The cases cited by him such as *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. Ed. 220; *Glicker v. Michigan Liquor Control Commission*, 160 Fed. 2d 96, are not in point for they are cases where a discretion was delegated to city officials by ordinance in granting or denying a license to do business and in each case the court held that an arbitrary refusal to grant the license to one

person when it was granted to others in like positions and under similar circumstances was a violation of the Fourteenth Amendment of the Federal Constitution.

The case of *Wade v. City and County of San Francisco*, 186 Pac. 2d 181, holds that the city in that case was deliberately and intentionally permitting some to sell magazine subscriptions while prohibiting others from selling magazine subscriptions in the same places and under similar circumstances.

Appellant made no allegations in his complaint alleging that the city was intentionally or deliberately permitting others to sell or solicit the sale of magazines for personal gain in the restricted area as prescribed by Section 3652 of the city ordinances or that the city had a discretion in permitting such sales, which discretion was being arbitrarily employed.

We agree with the trial court in its memorandum opinion that the city fathers have no right to permit any person to violate the law but the authorities hold that the mere lax enforcement of a law or ordinance violates no constitutional right.

The *Wade case*, *supra*, also holds that where 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 must be shown that there was an intentional discrimination, which of course must

be pleaded. *Dillon on Municipal Corporations* (3rd Ed.) Sec. 327 states as follows:

“Whether or not a municipal ordinance is discriminating, must be determined by the court as a question of law from the provisions of the ordinance itself and not from the manner of its enforcement.”

In the case of *City of Denver v. Girard*, 42 Pac. 662, the court said:

“The ordinance in question is not void because it conflicts with a prior ordinance relating to the same subject, and it is equally clear that it is not unreasonable merely because the municipal authorities have been lax in impartially enforcing it, or had not, at the time of the trial, instituted suits against other violators of its provisions.”

Also see *Sylvania v. Hilton*, 51 S. W. 744, 2 L.R.A. N.S. 483, wherein the court said:

“If the meaning of an ordinance is plain and unambiguous, the fact that it may have been repeatedly violated without objection on the part of the municipal officers will not alter its meaning, or furnish any defense to one who afterwards violates it.”

## CONCLUSION

The complaint of the appellant fails to state facts sufficient to constitute a cause of action and the order

of the trial court in sustaining the general demurrer, and its further order dismissing the complaint of appellant should be sustained.

Respectfully submitted,

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