

1980

Larry Hollingsworth D/B/A the King'S Palace &
Rusty Hanna, Et al., D/B/A the Society of Licensed
Masseurs v. the City of South Salt Lake, a Municipal
Corporation, Clint Balmforth, and the South Salt
Lake Police Department : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY HOLLINGSWORTH	:	
d/b/a THE KING'S PALACE &	:	
RUSTY HANNA, et al.,	:	
d/b/a THE SOCIETY OF	:	
LICENSED MASSEURS,	:	
	:	
Plaintiffs-Appellants,	:	No. 16,831
	:	
v.	:	
	:	
THE CITY OF SOUTH SALT LAKE,	:	
a Municipal Corporation,	:	
CLINT BALMFORTH, and THE	:	
SOUTH SALT LAKE POLICE DEPARTMENT	:	
	:	
Defendants-Respondents.	:	

BRIEF OF RESPONDENTS

APPEAL FROM A JUDGMENT ENTERED IN THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY
DISMISSING PLAINTIFFS' DECLARATORY JUDGMENT ACTION
HONORABLE HOMER F. WILKINSON

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POINT X.	THE PROVISIONS OF THE SOUTH SALT LAKE ORDINANCES ARE SEPARATE AND DISTINCT. INDIVIDUAL PROVISIONS OF THE ACT REMAIN IN EFFECT EVEN THOUGH OTHERS MAY BE DEEMED INVALID.	29
CONCLUSION.	31

exercise powers not delegated to them by the state or its Constitution. Each Justice soundly and fundamentally said that the subject Ordinance (32-1-1) was an attempt to exercise a power not so delegated. At 439.

Assuming, for the sake of argument, that §10-8-84 does indeed give additional wide powers to the city to do such things as "are necessary and proper to provide for the safety and promote the prosperity, improve the morals, peace and good order, comfort and convenience of the City and the inhabitants thereof, ..." We are still back where we started. This is still not an ordinance necessary or proper in the fight against prostitution. It does not deal with prostitution directly, but deals with it in an indirect manner, which the Court, in Jensen, clearly said cannot be done. This case is not analogous to the Allred case, where simply another aspect of the prostitution business was prohibited.

A case involving many of the same issues as are present here was before this Court in the case of Salt Lake City vs. Revene, 124 P2d 537 (Utah 1942). In that case, the Defendant was charged with the violation of a city ordinance regulating the hours in which a barbershop could remain open. Defendant demurred to the charge, and both the trial court and Supreme Court sustained that demurrer. The city argued that the regulation of hours of the business was "valid under the police power granted it by the legislature by §15-8-39, 15-8-84, and 15-8-61 . . ." at 538. The statutes cited, under the code of 1933, were the same statutes now designated as §10-8-39, 10-8-84,

and 10-8-61. Section 10-8-39 is the general license and taxing authority, and 10-8-61 allows the city to make regulations to "prevent the introduction of contagious, infectious or malignant diseases into the City. . ." Section 10-8-84, of course, is the general statement which has been previously discussed. The Court unanimously turned down the city's position, which the Court characterized as follows:

It is Plaintiff's position that the above ordinance regulating the hours of a barber shop is a valid exercise of the police power delegated by the legislature to the city to "regulate" for the safety and preservation of health of the community. The Plaintiff introduced evidence taken at a previous time in the form of testimony by barbers and health officials to the effect that a "tired barber was a negligent barber", tending to afford an opportunity for the spread of diseases associated with the profession. Further, that from an administrative standpoint it was impossible to inspect the barber shop after 6 o'clock P.M. at 538.

The Court then discussed this contention, as follows:

It has been repeatedly stated by this Court "That a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, -- not simply convenient but indispensable." (citations omitted) at 538.

The rule making power given to cities in reference to barber shops does not mean any rule but such rules reasonably related and designed to protect the health of the public. at 539.

A tired barber may be a careless barber but it does not follow that all shops which remain open more than a certain number of hours engage the same barbers throughout the entire period. Barbers can work in shifts. If the object of the law was

It is appropriate here to refer to the case of In re Lane, 372 P2d 897 (Calif 1962) in which the Court stated as follows:

Defendant was convicted of the crime of "resorting," after a court trial in the Municipal Court for the Los Angeles Judicial District on two charges of violating §51.07 of the Los Angeles Municipal Code, which provides: "No person shall resort to any office building or to any room used or occupied in connection with, or under the same management and any cafe, restaurant, soft drink parlor, liquor establishment, or similar businesses, or to any public park or to any of the buildings therein or to any vacant lot, room rooming house, lodging house, residence, apartment house, hotel, house trailer, street or sidewalk for the purpose of having sexual intercourse with a person to whom he or she is not married, or for the purpose of performing or participating in any lewd act with any such person. At 898.

The court, on page 899 of the decision lists numerous acts of sexual intercourse which have been made illegal by the state, and then goes on to list lewd acts in public places, crimes against children, indecent exposure, obscene exhibitions and acts against public decency as being outlawed by the state of California. Defendant was accused of going from her own living room to her own bedroom "for the purpose of having sexual intercourse with a male to whom she was not married." (At 898) The court stated:

Although living in a state of cohabitation and adultery is prohibited, neither simple fornication or adultery alone nor living in a state of cohabitation and fornication has been made a crime in this state. (citations omitted.)

Accordingly, a city ordinance attempting to make sexual intercourse between persons not married to each other criminal is in conflict with the state law and is void. At 900.

DECISION RENDERED BY THIS COURT.

Article VIII, §2 of The Constitution of Utah states as follows:

The Supreme Court shall consist of five Judges, which number may be increased or decreased by the legislature, but no alteration or increase shall have the effect of removing a Judge from office. A majority of the Judges constituting the Court shall be necessary to form a quorum or render a disposition. If a Justice of the Supreme Court shall be disqualified from sitting in a cause before said Court, the remaining Judges shall call a District Judge to sit with them on the hearing of such cause.

Oral argument on the merits of this case took place on November 10, 1980, with Chief Justice Crockett presiding, accompanied by Justices Stewart, Hall and Wilkinson. As Justice Maughan was ill, his place was taken by Kenneth Rigtrup, Judge of the Third Judicial District. Justice Wilkins resigned from the Court effective November 30, 1980 and Chief Justice Crockett's term ended at the end of December, 1980. Neither of these Justices participated in the decision. The decision was rendered by two regular members of the Supreme Court and one District Court Judge. Likewise, the companion case of Redwood Gym v Salt Lake County Commission, decided the same day and upon part of which the decision in the instant case was based, was decided by two regular members of this Court and one District Judge. While it appears that the Constitution gives this Court authority to make the decision as it did, the issues at hand call for

POINT IV

RECENT DEVELOPMENTS IN THE LAW SUPPORT APPELLANTS' POSITION THAT §3B-8-5(1) OF THE REVISED ORDINANCES OF SOUTH SALT LAKE IS INVALID.

The most recent State Supreme case previously cited by appellants regarding the validity of opposite sex massage ordinances was City and County of Denver v Nielson, 572 P.2d 484 (Col. 1977). In Respondents' Memorandum, which due to circumstances appellants had no opportunity to respond to, the case of City of Indianapolis v Wright, 371 N.E.2d 1298 (Ind. 1978) was cited. Respondents cited that case as another example where the constitutional arguments of denial of equal protection or due process were made by plaintiffs in a massage case, and went unheeded by both state and federal courts. Respondents, however, failed to notice a most important part of the holding rendered by that court. A lower court had invalidated the law by determining that the massage ordinance was an attempted local law in an area preempted by state law. The trial court so held, on the assumption that a violation of the prohibition on massaging a member of the opposite sex or touching of a patrons genitals was a criminal offense, punishable by the "general penalties" provision of the Indiana code, as a misdemeanor. The Indiana State Code provides a specific misdemeanor penalty

1 S. B. No. 26

2 required for the taking of any action under the Utah Medical
3 Practice Act.

4 (10) For practitioners in the treatment of human ailments
5 in accordance with the tenets of a professional school,
6 college, or institution, recognized by the department of
7 registration, of which the applicant is a graduate as
8 designated in his application for a license, including the
9 practice of obstetrics with the use of drugs or medicine, but
10 without operative surgery, except operative minor surgery, a
11 committee of five members to be designated by the director.
12 Notwithstanding the provisions of section 58-1-6, one member
13 shall be licensed to practice medicine and surgery in all
14 branches, two members shall be practitioners of naturopathy
15 licensed to practice the treatment of human ailments without
16 the use of drugs or medicine and without operative surgery, one
17 member shall be a citizen who is not licensed in any healing
18 art and one member shall be on the staff of the university of
19 Utah medical school.

20 (11) For practitioners of naturopathy, a committee of
21 three members, each of whom shall be a graduate of a school of
22 naturopathy of standing recognized by the department of
23 registration.

24 (12) For practitioners of physical therapy, a committee
25 of three members, each of whom shall be a licensed practitioner
26 of physical therapy in this state and a graduate of an approved
27 school of physical therapy.

28 (13) For osteopathic physicians and surgeons, a committee
29 of three members each of whom shall be a graduate of a
30 chartered college of osteopathy of recognized standing.

31 (14) For optometrists, a committee of three licensed
32 optometrists.

33 (15) For pharmacists, a committee of five pharmacists to
34 be designated as Utah state board of pharmacy.