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J. A. Stevenson et al v. Salt Lake City Corporation and Cleon Skousen : Brief of Respondents

Utah Supreme Court

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R. J. Rimensberger; Attorney for Respondents;

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

J. A. STEVENSON, RAY T. SAMUELSON, JOHN B. DAVIES, MAX K. HORTON, JACK LLEWELLYN, R. L. HOLT, EUGENE S. PHELPS, GUS WEISER, WILLARD SELANDER, SAMUEL A. MCHARG, JAMES H. SPRUNT, and IRVING MONSEY, individually and as members of INTERMOUNTAIN MUSIC OPERATORS ASSOCIATION, an unincorporated association,

Plaintiffs and Respondents

vs.

SALT LAKE CITY CORPORATION, and CLEON SKOUSEN, Salt Lake City Chief of Police,

Defendants and Appellants

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Clerk, Supreme Court, Utah

Case No.
8638

RESPONDENTS' BRIEF

R. J. RIMENSBERGER
Attorney for Respondents
404 Dooly Bldg.
Salt Lake City, Utah

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RESPONDENTS' BRIEF

STATEMENT OF FACTS

The statement of facts as set out in the brief of Defendants and Appellants is accepted by Respondents as being correct.

STATEMENT OF POINTS

POINT 1

SALT LAKE CITY CORPORATION WAS WITHOUT POWER TO PASS CHAPTER 2 OF TITLE 32 OF THE REVISED ORDINANCES OF SALT LAKE CITY, 1955.

POINT 2

CHAPTER 2 OF TITLE 32 OF THE REVISED ORDINANCES OF SALT LAKE CITY, 1955, VIOLATES THE CONSTITUTIONAL DUE PROCESS CLAUSE OF SECTION 7, ARTICLE I, CONSTITUTION OF UTAH.

ARGUMENT

Point 1. Salt Lake City Corporation was without power to pass Chapter 2 of Title 32 of the Revised Ordinances of Salt Lake City, 1955.

Appellants cite Sec. 10-8-40 and Sec. 10-8-84, UCA 1953, for legislative grant of power to Salt Lake City to pass the subject ordinance. That the latter section gives no such power is no longer debatable since this precise question, involving these two sections, has already been determined by this Court. In *American Fork City, v. Robinson*, 77 Utah, 168, 292 P. 249, this Court said "The last statute quoted (Comp. Laws Utah 1917, Sec. 570x87, now Sec. 10-8-84 UCA 1953) is merely in aid of the express powers elsewhere granted." Any other construction of this section would be an absurdity. This section (10-8-84) provides that cities "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 to provide for the general welfare of the inhabitants and to enforce such ordinances by fines and penalties. Since, presumably no ordinance is passed which is not for the general welfare of the inhabitants, to hold that the section gives to cities the power claimed for it by appellants would be to say that the Legislature said in effect to the cities “You may do all of the things enumerated in the first 83 sections of this chapter, and in addition to these, you may also do *anything else*.”

Power to pass this ordinance must therefore be found, if at all, in Sec. 10-8-40 UCA 1953. This section authorizes cities to “license, tax, regulate and suppress billiard, pool, bagatelle,” etc. Possibly the most significant issue to the determination of this case is the meaning of the term “suppress” as used in this statute. Appellants cite three cases to show that suppress means substantially the same thing as prohibit, but the cases are by no means consistent. The court said in *Johnson v. Town of Philadelphia*, 47 So. 526, 527, 94 Miss. 34, 19 LRA, NS 637, 19 Ann. Cas. 103, “A statute, authorizing a municipal corporation to ‘suppress’ skating rinks, gives no power to prohibit them.” In a recent decision (1950) the court said that where a statute gave the city power to license, tax, regulate or suppress billiard tables (identical wording to that in our statute), use of the word “suppress” conferred upon the city the power, as a police regulation, to suppress unlicensed billiard tables doing business without a license, but not the power to prohibit them. *City of Meadville v. Caselman*, 227 SW 2d 77,

80, 240 Mo. App. 1220. Since the term “suppress” is not entirely free from ambiguity, it is necessary to determine what meaning was intended by the Legislature in enacting Sec. 10-8-40 UCA 1953.

It is not necessary to look beyond the statute itself to find exactly what was intended, although this Court has already determined that intent, as pointed out later in this brief. Appellants quote only a part of Sec. 10-8-40. The entire section reads as follows:

“10-8-40. Resorts and amusements. — They may license, tax, *regulate and suppress* billiard, pool, bagatelle, pigeonhole or any other tables or implements kept or used for similar purpose; also pin alleys or tables, or ball alleys; may also license, tax, *regulate, prohibit or suppress* dancing halls, dancing resorts, dancing pavilions, and all places or resorts to which persons of opposite sexes may resort for the purpose of dancing or indulging in any other social amusements.”

As pointed out by the decision of the lower court, “It will be noted by an examination of the above-referred to statute that in the first portion of the statute the city may regulate and suppress certain items, one of which is the subject of this action. In the other portion of the statute the city has the power to prohibit and suppress. Apparently the Legislature, in passing this statute, made a distinction between prohibiting and suppressing.”

Nor does counsel for appellants seriously contend that the terms are synonymous in spite of his state-

ment to that effect. (Note on page 22 of appellants brief “In any event the ordinance of Salt Lake City amounts *only to a suppression* of the machines as the case of *Ex Parte Lawrence*, *supra*, makes abundantly clear. The effect is not, as stated by the lower court, an absolute prohibition”, and similar statements elsewhere in appellants brief.)

It is most interesting to note that counsel for appellants (page 21 of appellants brief) cites Sec. 17-5-27 UCA 1953 purporting to give *counties* the power to suppress and prohibit, and by implication urging that the Supreme Court of the State of Utah should find that the comparable section pertaining to *cities* means something different from what it says because it is “inconceivable” that the Legislature intended to grant broader power to counties than to cities. This grasping for straws hardly seems to require rebuttal.

It seems perfectly clear from the foregoing, that Sec. 10-8-40 UCA 1953, gives to cities, in the first part of the statute, the power to regulate and suppress, but not to prohibit the activities which are the subject of this action. It is therefore necessary to determine the effect of the subject ordinance.

It should be observed that the preamble and the title of the first section of the subject ordinance refer to “*prohibition of pin ball machines*”. It is not difficult to determine that that is precisely what was intended—an absolute prohibition of these devices.

A pin-ball machine is a device with which the owner offers to the public, for a fee, the right to play and operate such device for such amusement as he may

derive therefrom. This ordinance prohibits their use in the only places where their use is possible. It could be argued with equal cogency that an ordinance prohibiting the use of motor vehicles on city streets was suppressive only, because they could still be used in one's home or back yard—or that a statute prohibiting motion picture theatres from admitting the public for an admission fee was suppressive only, because the owner could still invite his friends to the theatre gratuitously. In *Johnson v. Town of Philadelphia*, supra, the ordinance in question required skating rinks to be closed after 6 P.M., when the statute empowered the city to *regulate and suppress* skating rinks. The court found this to amount to a *prohibition* of skating rinks. The court there said “Under the pretense of regulating a business, the business attempted to be regulated cannot be destroyed. This was not the intention of the Legislature. If the Legislature had intended that amusements of this character could be prohibited by a municipality, they would have said so in unequivocal terms.”

It is important to observe that great reliance is placed by appellants on the case of *Ex Parte Lawrence*, 55 Cal. App. 2d 491, 131 P 2d 27, construing a city ordinance similar to that of appellants. In the Lawrence case the court said “In the case now before us, *regulation, not prohibition, is decreed by the ordinance*. The games are proscribed only in places of business or in any other ‘place of public resort’, and exception is made of the amusement zones described in another Long Beach ordinance. In other words, ‘pin ball’ and other games denominated in the ordinance

may be maintained at private house or *in certain delineated amusement zones.*" The clear and unequivocal implication is, that if it were not for the amusement zones in Long Beach, where pin ball machines could be operated, that the ordinance would have amounted to a prohibition, and the court would have struck down as ultra vires an ordinance such as that passed by appellants, and in this regard, it is clear that the Lawrence case constitutes strong support for respondents position.

The Utah case of *American Fork City v. Robinson*, supra, is consistent with the foregoing discussion and with the authorities cited distinguishing suppression from prohibition of amusement devices. A careful reading of this case makes it obvious that appellants have wholly misconstrued the holding of this case, as shown by a confusing attempt to find something in the case that is simply not there. The facts were simple. One ordinance prohibited the use of billiard and pool tables in public places, another prohibited them in club rooms. The latter was being tested, the former was not before the Court. The Supreme Court simply held that the ordinance went too far in prohibiting their use, when the enabling act authorized only suppression. The indisputable implication is that had the other ordinance, prohibiting their use in public places, been before the court, *it would have struck down that ordinance also.* Nowhere does the court say, or imply, that the ordinance was not broad enough, as appellants contend. On the contrary, the court says, "The first statute referred to (now Section 10-8-40 UCA 1953) plainly confers power with

reference to billiard and pool tables; and does not extend beyond the regulation or suppression of keeping them” and it seems clear that the court said in effect that *prohibiting* the playing at billiards or pool *does* extend beyond the regulation or suppression of keeping them, *that it had already gone too far* and had in fact prohibited rather than suppressed them.

Appellants attempt to find a distinction in the American Fork City case between “use” or “playing at billiards” and the “keeping of billiard tables”. No such distinction exists. The ordinance before the court in that case read in part: “Sec. 3. Billiards and Pool. It shall be unlawful for any person to *keep for use* in any Club Room in this city any billiard or pool table . . .”, so that ordinance did specifically attempt to prohibit the keeping of billiard tables, and not, as has been said, the playing at billiards. When that court said “The part of the ordinance in question does not deal with the subject of keeping billiard or pool tables . . .” it merely said in effect that the ordinance attempted to prohibit billiard and pool, rather than to *regulate and suppress* the keeping of them.

While the decision in the American Fork City case is clear and unambiguous, it should be noted that the significant facts and argument before the court in that case, as found in the abstract and briefs of appellants and respondents in that case, concerning power of the city to pass the ordinance were *practically identical to the facts and arguments presented in this case*. Since the pertinent statutes remain unchanged, and since the legal issues are indistinguishable, only by a

complete repudiation and reversal of its former unanimous decision could this Court uphold the validity of the appellants ordinance.

In *Nasfell v. Ogden City*, 249 P. 2d 507, this Court said:

“We are committed to the principle that cities have none of the elements of sovereignty, that ‘any fair, reasonable, substantial doubt concerning the existence of the power is resolved by the courts against the corporation (city) and the power denied’. *Utah Rapid Transit Co. v. Ogden City*, 89 Utah 546, 58 P 2d 1, and 1 Dillion, *Municipal Corp.*, 5th ed., p 448, Sec. 237; *Salt Lake City v. Revene*, 101 Utah 504, 124 P 2d 537 . . . So firm have we stood in construing express grants of power to cities as to conclude that cities have no implied power to prevent billiard playing, where the Legislature granted express power to ‘license, tax, regulate and suppress billiard tables . . .’ *American Fork City v. Robinson*, *supra* . . . The policy of our law thus is settled. The rule promotes a wholesome, uniform orderliness among the municipalities of the state. Its wisdom is not open to question at this date, and we ought not depart from it lightly.”

Attention is again called to the dissent in the *Nasfell* case, cited by appellants, wherein Justice Crockett said “I expressly agree with Mr. Chief Justice Wolfe’s statement, ‘some of our holdings we have too narrowly construed the granted powers’ ”, citing the *American Fork City* case and others. Without questioning the wisdom of the court in thus “narrow-

ly construing the granted powers'', it is significant to note that the American Fork City case was decided on October 11, 1930, in a unanimous decision. Since that time the Utah Legislature has been in general session *fourteen times*, and has not seen fit to change in any way, the statute so construed by this Court. Certainly if there remained any doubt about the extent of the grant of the power in this statute, that doubt has been resolved by the tacit approval of fourteen State Legislatures of the narrow construction of the subject statute. It seems also apparent from the several opinions in the Nasfell case that although one may disagree with the wisdom of these decisions, very strictly construing grants of power to cities, that it is recognized that such is the law of this State, and that the great importance of the doctrine of stare decisis far outweighs any considerations that would lead to reversing the decisions of this court of so long a standing.

Point 2. Chapter 2 of Title 32 of the Revised Ordinances of Salt Lake City 1955, violates the constitutional due process clause of Section 7, Article I, Constitution of Utah.

Certain facts we believe to be of common knowledge, without reference to statutory or municipal law, judicial authority, or expert testimony. Pin-ball machines have been used for many years to provide such amusement as may be obtained therefrom. Many of them are readily adaptable and convertible into gambling devices, and no amount of whitewash could conceal the fact that they have been so adapted and converted

on numerous occasions, in violation of state and municipal gambling laws, although, that this is their sole purpose we vehemently deny. It was clearly the purpose and intent of defendants in passing the subject ordinance to find a *short cut in the enforcement of the existing criminal gambling laws* by absolutely forbidding their use, and no one will be deceived or misled by legal rationalizing of appellants, e.g., that the ordinance only regulates and suppresses their use. The same motives would be equally valid in prohibiting the multitude of other recreational, amusement, athletic events, and other sports and activities, which likewise can be, and frequently are, made the basis of violations of the gambling laws of this State. This is an attempt at "preventive criminal legislation" which is repugnant to all our concepts of fair play.

That reasonable regulation of the operation of pin-ball machines is proper and warranted is not denied, but the subject ordinance if enforced, would, as it was intended to do, put out of business all pin-ball machine operators, including the prohibition of many innocuous machines, designed for amusement only, and operated for amusement only.

The waning efficacy of constitutional due process, particularly in the U.S. Constitution, and to a much lesser degree in the various state constitutions, and the corresponding increase in the police power, has to a large extent been necessitated by the increasing complexity of our society. Since the invalidation of the National Industrial Recovery Act, no important federal legislation has been held unconstitutional on

any grounds. Some states have, by judicial decisions, almost completely abrogated the due process and other constitutional provisions and given carte blanche authority to the lawmakers, through their police power, to legislate what in their opinions will best serve the so-called general welfare. But it will be a sad day in the history of political democracy when substantive due process is dead and the "tyranny of the majority" becomes absolute.

Although most of the cases cited by appellants on the question of constitutional due process are distinguishable and not in point here, such as the Lawrence case, where due process and police power were considered in the light of an ordinance which only regulated and suppressed the operation of pin-ball machines, a few of the States highest courts have determined the due process question as it relates to pin-ball machines, and it is not denied that at least two of these have decided that an ordinance prohibiting them did not violate the constitutional provisions of those States. The Supreme Court of this State has never gone so far in destroying the rights of minorities for what is believed by the legislators to be in the best interests of the general welfare.

Since this Court has already decided, in the American Fork City case, that a municipality has no power to prohibit the activities enumerated in the first part of Sec. 10-8-40 UCA 1953, it should be unnecessary to determine the question of constitutional due process at this time. However, when the issue is presented to this Court in a proper case, where minority interests

do not have available the facilities of any other forum, serious consideration must be given to the extent to which the police power may be used to reduce to impotence the due process clause of our constitution.

CONCLUSION

This Court has already determined that cities do not have the power to prohibit pin-ball machines, but only to regulate and suppress them. When, in the exercise of such power, they exceed the bounds of regulation and suppression, as appellants have done in this case, it is the duty of the courts to strike down such ordinance as ultra vires as the lower court has done, and that decision should be affirmed.

R. J. RIMENSBERGER
Attorney for Respondents
404 Dooly Bldg.
Salt Lake City, Utah