1957

Salt Lake City Lines v. Salt Lake City : Brief of Appellant

Utah Supreme Court

Calvin L. Rampton; Attorney for Plaintiff;

In the Supreme Court
of the State of Utah

SALT LAKE CITY LINES,
Plaintiff and Appellant,

vs.

SALT LAKE CITY,
Defendant and Respondent.

Case
No. 8654

BRIEF OF APPELLANT

CALVIN L. RAMPTON
721 Continental Bank Bldg.
Salt Lake City, Utah

Attorney for Plaintiff and ~~Respondent.~~ App

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INTRODUCTION

This is an appeal from an Order of the District Court of the Third Judicial District in and for Salt Lake County denying the plaintiff's Motion for Summary Judgment in the above entitled case and granting the defendant's Motion for a Summary Judgment of Dismissal.

The appellant raises no procedural question by this appeal

as it is agreed that this was a proper case for summary judgment. All material facts in the case are established by the pleadings, the only question being a question of law as to whether the plaintiff's Motion or the defendant's Motion should have been granted.

STATEMENT OF FACTS

The plaintiff is a Utah corporation rendering mass transportation service in Salt Lake City and surrounding area. On the 12th day of July, 1944, the Public Service Commission of Utah issued Certificate of Convenience and Necessity No. 640 to the plaintiff, granting to the plaintiff the right to operate street cars, trolley coaches and motor busses in Salt Lake City and the surrounding area. A copy of the certificate was attached to the Complaint as Exhibit A and is part of the record on appeal in this court. Salt Lake City Lines at the time of issuance of the Certificate of Convenience and Necessity took over the services that had theretofore been rendered by its predecessor, Utah Light & Traction Company. In 1946 Salt Lake City Lines ceased the operation of street cars and trolley coaches and during the same year removed from the city streets of Salt Lake City all tracks and trolleys, and since 1947 has operated solely by the use of motor busses.

On the 25th day of February, 1951, Salt Lake City adopted an Ordinance which purported to grant a franchise to Salt Lake City Lines to operate as a common carrier within Salt Lake City, a copy of this Ordinance is attached to the Complaint as Exhibit B. Section 8 of this Ordinance provided that as a consideration for the granting of the franchise, Salt Lake City

Lines should pay to Salt Lake City a tax of 2% upon the gross revenue of the company obtained within Salt Lake City. Section 10 of the Ordinance provided as follows:

> "Salt Lake City Lines shall, within 30 days after the effective date of this Ordinance, file its acceptance thereof in writing with the City Recorder of Salt Lake City, otherwise the same shall be null and void."

Salt Lake City Lines has never at any time filed an acceptance of this Ordinance. Salt Lake City Lines, although it had never accepted the Ordinance, did pay 2% of its gross revenue derived within Salt Lake City Limits during the years 1951, 1952, 1953, 1954, and 1955. In 1956, Salt Lake City Lines requested of the City Commission of Salt Lake City that it not be required to pay the franchise tax. The City Commission thereupon adopted an Ordinance reducing the franchise tax to 1% for the year 1956. During the year 1956, Salt Lake City Lines paid 1% of its gross revenue derived within Salt Lake City to the Salt Lake City government. As of January 1, 1957, the City demanded that Salt Lake City Lines again resume payment of the tax at 2%.

The gross receipts tax thus established is not applicable to sight-seeing busses, taxi cabs, intercity busses or any other type of business enterprise running rubber tired motor vehicles for hire on the streets of Salt Lake City. By separate Ordinances the 2% gross receipts tax is applied to the electric utility, the telephone utility and the natural gas utility rendering service within Salt Lake City.

Early in the year 1957 the plaintiff instituted this action for a declaratory judgment, declaring the Ordinance of

February 27, 1951 null and void. Salt Lake City filed an Answer admitting the facts set forth in the Complaint and alleging certain additional facts. The plaintiff thereupon filed a Motion for Summary Judgment and the defendant filed a Motion for Summary Judgment of Dismissal in its favor. After hearing oral arguments the defendant's Motion was granted. No Memorandum Decision was prepared by the district court so it is impossible for counsel to determine the exact grounds upon which the order of the court was made. In seeking a reversal of the judgment of the court below, the plaintiff and appellant relies upon the following Statement of Points.

STATEMENT OF POINTS

The District Court erred in granting the defendant's Motion for Summary Judgment and denying the plaintiff's Motion for Summary Judgment for the following reasons:

POINT ONE

THE ORDINANCE OF FEBRUARY 27, 1951 IS NULL AND VOID UNDER ITS OWN TERMS BECAUSE OF THE REFUSAL OF THE PLAINTIFF TO ACCEPT THE SAME.

POINT TWO

PLAINTIFF IS NOT ESTOPPED FROM CHALLENGING THE VALIDITY OF THE ORDINANCE BY REASON OF THE FACT THAT IT HAS VOLUNTARILY

MADE PAYMENT OF THE TAXES LEVIED BY SAID ORDINANCE.

POINT THREE

SECTION 8 OF THE ORDINANCE OF FEBRUARY 27, 1951 IS VOID AND INEFFECTIVE AND IN VIOLATION OF THE PROVISIONS OF SECTION 10-8-80, U.C.A., 1953 FOR THE REASON THAT THE TAX LEVIED THEREIN IS NOT UNIFORM IN RESPECT TO THE CLASS UPON WHICH IT IS IMPOSED.

POINT FOUR

SALT LAKE CITY HAS NO POWER TO LEVY A TAX UPON THE PLAINTIFF IN CONSIDERATION OF THE GRANTING OF A FRANCHISE FOR THE REASON THAT SALT LAKE CITY HAS NO POWER OR AUTHORITY UNDER THE LAWS OF THE STATE OF UTAH TO EITHER GRANT OR WITHHOLD A FRANCHISE FOR THE BUSINESS CARRIED ON AND CONDUCTED BY THE PLAINTIFF AT AND SINCE THE TIME OF THE ENACTMENT OF THE ORDINANCE OF FEBRUARY 27, 1951.

ARGUMENT

POINT ONE

THE ORDINANCE OF FEBRUARY 27, 1951 IS NULL AND VOID UNDER ITS OWN TERMS BECAUSE OF

THE REFUSAL OF THE PLAINTIFF TO ACCEPT THE SAME.

The Ordinance of February 27, 1951 purports to grant a franchise to the plaintiff to engage in the business of rendering mass transportation service within Salt Lake City. The Ordinance authorizes the company to render service by means of motor coaches, trolley coaches or street cars. Paragraph 8 of the Ordinance imposes the 2% gross receipts tax as a consideration for the granting of the Ordinance. Paragraph 10 of the Ordinance provides that unless it is accepted in writing by the company within 30 days after enactment, it shall become null and void. It is admitted by the Answer that the plaintiff company did not file a written acceptance of the Ordinance. The reasons that the company did not file the written acceptance are obvious. In the first place, it did not want a franchise to operate street cars and trolley coaches because it had not been operating that type of conveyance for some four years and had no intention of ever again operating such conveyances. In the second place, under the laws of the State of Utah, Salt Lake City was without power to either grant or withhold a franchise to operate motor busses as will be hereinafter more fully discussed. In the third place, the company did not want to become subject to the 2% gross receipts tax. The company not having complied with the requirements of the franchise ordinance to make it become operative, the Ordinance falls by its own terms and the lower court should have declared it null and void because of that fact.

POINT TWO

PLAINTIFF IS NOT ESTOPPED FROM CHALLENGING THE VALIDITY OF THE ORDINANCE BY REASON OF THE FACT THAT IT HAS VOLUNTARILY MADE PAYMENT OF THE TAXES LEVIED BY SAID ORDINANCE.

The defendant, while it admits that the plaintiff did not accept the Ordinance in writing according to the terms thereof, maintains that the plaintiff is now estopped from attacking the validity of the Ordinance on two grounds:

A. That it has actually carried on the business of rendering mass transportation in Salt Lake City since the enactment of the Ordinance; and

B. That it has made payment of the tax provided for in the Ordinance for a number of years since the enactment of the Ordinance.

The invalidity of the first basis of estoppel claimed will be more fully discussed in another section. Suffice it to say at this point that the plaintiff does not recognize the right of Salt Lake City to either grant or withhold a franchise to operate motor busses on the Salt Lake City streets. The power to either withhold or grant a franchise is vested by the laws of the State of Utah with the Public Service Commission of Utah. The acts of the plaintiff in carrying on such business since February 27, 1951 are not acceptance of the franchise requirements even by implication for the reason that the plaintiff was doing nothing that it could not have done and would not have done had the franchise Ordinance never been adopted.

It was carrying on its business of rendering mass transportation service not pursuant to the Ordinance of February 27, 1951, but pursuant to Certificate of Convenience and Necessity No. 640 issued by the Public Service Commission of the State of Utah.

The second ground of estoppel claimed by the defendant is equally without merit. The fact that the tax has been paid cannot raise an estoppel. It is fundamental that an estoppel arises only where one party by the performance of an act has caused another party to change its position to its detriment in reliance upon such act.

The following language is found at 19 Am. Jur. page 642 and 643:

> "The essential elements of an equitable estoppel as related to the party estopped are: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially."

Applying the tests set forth above, let us ask the question, First: Has Salt Lake City suffered from the act of the plaintiff in paying the tax? The answer is obviously it has not, it has benefited. The 2% gross receipts tax yields a great deal more revenue than would a tax on the plaintiff company based upon

the same rates of taxation as are applied to other companies operating rubber-tired motor vehicles on the city streets for hire. Although this is not part of the record, it was agreed by counsel at oral argument before the lower court that the gross receipts tax has yielded Salt Lake City over the period of years an average of $30,000.00 each year, whereas the vehicle tax applicable to other rubber-tired motor vehicles, as applied to the plaintiff's busses, would have yielded only about $4500.00 per year.

The attention of the court is called to the fact that this is not an action to recover anything that has been paid in the past, but merely a petition to have the franchise declared invalid so that the plaintiff will have to make no payments under the invalid ordinance from here on. It is quite clear, therefore, that Salt Lake City has suffered no detriment from the act of the plaintiff in paying the tax, but has actually benefited to the extent of approximately $125,000.00. Let us ask again, has Salt Lake City changed its position prejudicially because of the voluntary payment of the tax by Salt Lake City Lines. The answer once again is obviously no. Whatever position Salt Lake City Lines took in adopting the Ordinance it adopted prior to the time that the tax became due. It has not changed its position since that time, but is adhering to the position which it adopted at the time of the enactment of the Ordinance. If in fact the Ordinance is invalid and declared so, the city's power to adopt a new and valid Ordinance is no less today than it would have been immediately after the enactment of the Ordinance and before the payment of any money under the tax was made. There are no elements of estoppel present

in this case and there is no reason why the plaintiff should not be permitted to attack the validity of the Ordinance today with the same force and effect that it could have attacked it on the first day of April, 1951.

This same point was raised before the Supreme Court of Iowa in the case of Edward J. McKeon et al v. City of Council Bluffs, 221 N.W. 351. In 1877 the Missouri River changed its course cutting off from the City of Council Bluffs an area of some 1200 acres which had formerly been contiguous to the balance of the city. Although the cut-off portion, from the time of the shift of the river on, received no benefits from the city in the way of police service, fire service, etc. no petition for severance from the city was made for a period of some 50 years after the change in course. In the late 1920's the residents of the portion of the city which had been cut off, petitioned for severance on the ground that their property was no longer contiguous to the balance of the city and received no benefits from the city. The city attempted to defend on the grounds that the residents of this area were estopped from raising the question of severance because for a period of 50 years following the shift in the course of the river they had continued to pay taxes levied by the City of Council Bluffs. In disposing of this question of estoppel the Iowa Supreme Court stated:

> "Equitable estoppel does not arise, in the absence of reliance and injury. If the adverse party has not acted to his prejudice, he is in no position to assert an equitable estoppel. Harley v. Merrill Brick Co. 83 Iowa, 73, 48 N.W. 1000; 5 Pom Eq. Jur. 4th ed. Sec. 951; 21 C. J. 1202. * * * No prejudice has resulted to the city of

Council Bluffs from the delay in asking for severance. The city has during the years subjected the property in question to municipal taxation without reciprocal benefits. Submission to an inequitable tax for one year can give no right to the imposition of it the next year. Such payment of taxes cannot be effectively set up as estoppel. Deiman v. Ft. Madison, 30 Iowa, 542, 550.

"Furthermore, the property owners have had each and every year the statutory right to severance. The condition giving them that right was a continuing condition, and the statutory right was a continuing right. None of the suggested defenses can apply to such a continuing and ever-existing and present right. Deiman v. Ft. Madison, 30 Iowa, 542; Smith v. Jefferson, 161 Iowa, 245, 45 L.R.A. (N.S.) 792, 142 N. W. 220, Ann. Cas. 1916A, 97; MacGowan v. Gibbon, 94 Neb. 772, 144 N.W. 808."

The defendant has suffered no detriment from the fact that the plaintiff has voluntarily paid the tax. The company should not, therefore, be estopped now that it is in financial straits and has difficulty paying the tax by the fact that during more affluent years it voluntarily paid the tax illegally imposed in order to avoid an open breach with the city authorities.

POINT THREE

SECTION 8 OF THE ORDINANCE OF FEBRUARY 27, 1951 IS VOID AND INEFFECTIVE AND IN VIOLATION OF THE PROVISIONS OF SECTION 10-8-80, U.C.A., 1953 FOR THE REASON THAT THE TAX LEVIED THEREIN IS NOT UNIFORM IN RESPECT TO THE CLASS UPON WHICH IT IS IMPOSED.

Section 10-8-80, U.C.A. 1953 provides as follows:

> "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; provided , that no Utah city or town shall collect a license fee or tax hereunder from any solicitor or salesman who solicits, obtains orders for or sells goods in such city or town solely for resale; and no enumeration of powers of cities contained in this chapter, shall be deemed to limit or restrict the general grant of authority hereby conferred. *All such license fees and taxes shall be uniform in respect to the class upon which they are imposed.* (Italics added.)

Salt Lake City has made no effort to make the gross receipts tax applicable to other firms or individuals carrying on businesses of the same class as that carried on by Salt Lake City Lines. The tax is not applicable to sigth-seeing busses which operate mostly within Salt Lake City, it is not applicable to taxi cabs, nor is it applicable to inter-city buslines which operate in and through Salt Lake City. These other companies pay a per vehicle tax which is graded upward according to the passenger carrying capacity of the vehicle in question. This vehicle tax if applied to Salt Lake City Lines would be but a small fraction of the amount of the gross receipts tax. The only other firms to which the gross receipts tax is applicable are the gas, electric and telephone utilities and certainly Salt Lake City Lines cannot be classified with these other utilities because, as is more fully set forth in the next succeeding section, while the city does have power to franchise the operation of the gas, electric and telephone utilities in Salt Lake City, it has no such power in regard to the business carried on and conducted by Salt Lake City Lines.

The necessity that a city license, fee or tax be uniform in respect to the class upon which it is imposed has been passed upon by this court a number of times. In the case of Salt Lake City v. Utah Light & Railway Co., 45 Ut. 50, 142 Pac. 1067, the validity of a Salt Lake City Ordinance establishing a license tax was challenged. The Ordinance in question imposed a license tax of $1.00 per year per meter on electric companies furnishing electricity through metered service within the limits of Salt Lake City. The court held this Ordinance invalid because it applied only to companies furnishing electric service through meters and not to all companies furnishing electrical service. In passing upon the validity of this Ordinance, the court stated:

> "Uniformity and equality, so far as those elements can be attained, are always to be the aim and guide of those upon whom is conferred the authority to impose or assess taxes. When once inequality is permitted, and it is established that the burden of taxation may be unequally distributed under governmental authority, the government permitting it becomes a farce and is entirely unworthy of either our respect or support. So long as the burdens of taxation are distributed equally, they cannot well become oppressive, since they are imposed upon those constituting the community at large, and the community as a whole always possesses the power to relieve itself in one way or another. When, however, the burdens are imposed upon only a part less than the majority, or a smaller fraction, the burden may easily become destructive, and, if not destructive, at least unjustly oppressive. Equality, therefore, becomes a safeguard against, if not an absolute prevention of, excessive and oppressive taxation. Where, however, those who, for the time being, are intrusted with the power to pass laws or ordinances by which taxation

may be imposed invade the rule of equality prescribed by the paramount law, it is the duty of the courts, when proper application is made, to declare such law or ordinance void, and thus arrest the evil at its inception. In doing so the courts are not, as it is sometimes popularly assumed, interfering with the law-making power, but are merely compelling that power to observe and obey the paramount law. For the reasons last stated, we are required to declare the ordinance in question invalid."

In the case of Park City v. Daniels, 36 Ut. 554; 149 Pac. 1094, the validity of a tax ordinance was challenged. The ordinance in question imposed a license fee on peddling or selling certain designated articles. In declaring the Ordinance unconstitutional, the court stated:

"It will be observed that subdivision 'a', under which appellant was convicted, includes all who sell, offer for sale, or take orders for "fresh meat, or any goods, wares or merchandise of a general character, or for teas, coffees, spices, extracts, clothing, dresses, knit goods or underwear, either with a team or on foot." These are taxes at the rate of one hundred dollars a year payable in advance. It will also be noticed that each and every one of the foregoing articles are not only perfectly harmless, but are such as are used in all households, and therefore cannot require special police protection or regulation. The same may be said with regard to the articles mentioned in subdivisions 'b' and 'c', with the exception, perhaps, that the articles mentioned in those two subdivisions, or at least some of them, are not in such constant demand or use as are those in subdivision 'a'. There is, however, no apparent reason why a person should be required to pay one hundred dollars a year in advance for the right to sell or solicit orders for "fresh meat," while he may sell

all kinds of fish, poultry, and farm and dairy products for seven dollars and fifty cents a quarter payable quarterly. Again, why should one person be required to pay one hundred dollars a year in advance for selling tea and coffee, while he may sell any one or all of the other things enumerated in subdivision 'b' by paying seven dollars and fifty cents four times a year? Is it not manifest that all those who may sell, offer for sale or solicit orders, etc., whether for the articles enumerated in subdivision 'a' or any of them or those mentioned in the other subdivisions, are all engaged in the same occupation or calling, namely, selling or soliciting orders for the sale of articles of ordinary merchandise? Is it not equally manfest that a person may, with his team and wagon, sell and deliver quite as much in any given time of the articles enumerated in subdivision 'b' as he can of those mentioned in subdivision 'a'? Whether that be so or not, however, are they not all engaged in peddling or in attempting to sell, or in selling or in taking orders for the sale of ordinary articles of merchandise or household goods? Again, is it not patent to all that there is a clear discrimination against those who may solicit or sell any of the articles mentioned in subdivision 'a' and in favor of those who may solicit orders for or sell any of the articles enumerated in the other two subdivisions of the ordinance in question?

* * *

While the city authorities of the cities of this state may impose license or occupation taxes, and for that purpose may make reasonable classifications, yet the statute conferring the power (Comp. Laws 1907, section 206, subd. 87) in express terms also provides the manner of the imposition of such taxes in the following words:

'All such license fees and taxes shall be uniform in respect to the class upon which they are imposed.'

> The very statute, therefore, which grants the power, also imposes the condition of uniformity. In Salt Lake City v. Christensen Co., 34 Utah, 38, 95 Pac. 523, 17 L.R.A. (N.S.) 398, we held that it is proper to classify stocks of merchandise or occupations for the purpose of arriving at uniformity. In State v. Bayer, 34 Utah, page 266, 97 Pac. 129, 19 L.R.A. (N.S.) 297, in referring to statutes imposing such taxes, Mr. Justice Straup said:
>
> > 'It is essential, however, to the constitutionality of such statutes, that the tax apply equally to all persons of a given class and is uniform and equal.'
>
> We enforced that rule in Salt Lake City v. Utah L. & Ry. Co., 45 Utah 50, 142 Pac. 1067, where we held a certain ordinance invalid because it was discriminatory. The rule adopted by this court is the rule that is generally enforced by the courts of last resort. In 2 McQuillan, Mun. Corps., section 738, the author states the law upon this subject thus:
>
> > 'The discriminations which are open to objection (lack of uniformity) are those where persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions.' "

It would be difficult to find an Ordinance which more clearly violates the requirement of uniformity than does the Ordinance now being challenged in this action. The Ordinance is applicable to one company and one company only. Furthermore, even if read in conjunction with other licensing and taxing ordinances it does not achieve uniformity for the reason that the basis of the license or tax imposed under this ordinance is different from those imposed in other ordinances on other individuals and firms engaged in the business of rendering

transportation to passengers for hire over and through the streets of Salt Lake City. Applying the test set forth in the case last cited, all such companies are selling the same thing, transportation. The ordinance is clearly invalid and should be declared so by this court.

POINT FOUR

SALT LAKE CITY HAS NO POWER TO LEVY A TAX UPON THE PLAINTIFF IN CONSIDERATION OF THE GRANTING OF A FRANCHISE FOR THE REASON THAT SALT LAKE CITY HAS NO POWER OR AUTHORITY UNDER THE LAWS OF THE STATE OF UTAH TO EITHER GRANT OR WITHHOLD A FRANCHISE FOR THE BUSINESS CARRIED ON AND CONDUCTED BY THE PLAINTIFF AT AND SINCE THE TIME OF THE ENACTMENT OF THE ORDINANCE OF FEBRUARY 27, 1951.

Salt Lake City apparently relies on an asserted power to grant a franchise to Salt Lake City Lines as a basis for the imposition of the gross receipts tax. In argument in the court below, counsel for Salt Lake City asserted this power to grant a franchise as a basis for the imposition of the tax on two separate grounds. First, it was asserted that as the city had the power to grant or withhold franchises, it could attach such terms and conditions to the granting or withholding as it saw fit, including the imposition of the tax. Second, it was asserted that as the 2% gross receipts tax was, by separate ordinances, imposed upon the gas, electric and telephone utilities which

were subject to the franchise requirements of the city, the tax was uniform on all individuals of a given class, that class being the individuals or firms subject to the power of the city to franchise.

Both of these asserted grounds fall, of course, if in fact Salt Lake City has no power to grant or withhold a franchise to an individual or firm which carries on a business of transporting passengers by motor bus in mass transportation within the city. This question is not open to any doubt within the State of Utah, but has been passed upon by this court. In the case of Utah Light & Traction Co. v. Public Service Comm., 118 P (2) 683; 101 Utah 99, decided in 1941, the court passed squarely upon this proposition. In that case, Utah Light & Traction Co., the predecessor company of Salt Lake City Lines, was operating as a transporter of persons in mass transportation within Salt Lake City and between Salt Lake City and certain adjacent areas. Utah Light & Traction Co. had a Certificate of Convenience and Necessity from the Public Service Commission of Utah. It also had a franchise from Salt Lake City which at that time it needed because of the fact that it was rendering transportation service not only by use of motor coach, but also by use of street cars and trolley coaches. The Public Service Commission of Utah had also granted a Certificate of Convenience and Necessity to Airway Motor Coach Lines, Inc. to operate as a common carrier of passengers between certain communities in the southeast section of Salt Lake City and downtown Salt Lake City. Airways had no franchise from the city to conduct that portion of its operation which was conducted within Salt Lake City. Airways used no street cars nor trolley coaches, but operated entirely by

use of motor busses just as does Salt Lake City Lines at the present time. The Supreme Court held that while cities had the power to grant or withhold franchise to street railways, to waterworks companies, gas companies, electric light companies, telephone and telegraph companies, etc. that they have no power to grant to or withhold franchise from motor bus companies.

The following quoted paragraph states in full the basis of that opinion by this Court:

> "It is evident that the provisions of the subsection do not apply to certificates such as that here involved, but only to the classes specified in the subdivision itself. This is further evident from the fact that a city or municipal corporation has no power under our statutes to grant to or require an automobile corporation (defined in sub-division 12, Section 76-2-1, R.S.U. 1933), to have a local franchise to engage in business Cities and incorporated towns have no general grant of power to require or grant franchises. They may grant franchises to railroads, street railways, tramways, and union railroad depot companies (Section 15-8-33), to waterworks companies, gas companies, electric light and telephone lines (Section 15-8-14); to telegraph and all wire lines and pole lines (Section 15-8-21); to gas, electric or lighting works (Section 15-8-20). And there is a special provision as to railroads in Section 77-0-8 The Constitution, Article 12, Section 8, reserves to cities and incorporated towns the franchise power of street railway, telegraph, telephone and electric light companies. These sections cover all the franchise powers of cities and towns as set forth and granted by the statutes. That an automobile corporation such as this is not a street railway was held in Utah Rapid Transit Co. v. Ogden City et al., 89 Utah 546, 58 P2d.

See, also, subdivisions 8 and 12 of Section 76-2-1, R.S.U. 1933, defining both terms. As to motor transport companies (automobile corporations), the cities' power is found in Section 15-8-39, R.S.U. 1933, providing "they may *license, tax and regulate* * * * *stages and busses,* sight-seeing and touring cars or vehicles, cabs and taxi-cabs * * * hackmen, draymen, and *drivers of stages, busses,* sight-seeing and touring cars, cabs and taxicabs and other public conveyances. (Italics added.) There is no power granted to require or grant a franchise for the use of the streets and highways for the purpose of traveling thereon as used by the public generally. A franchise is the privilege of doing that which does not belong to the citizens generally by a common right. 12 R.C.L. p. 174. As to streets, it is the right to do something in the public highway which except for the grant would be a trespass. People v. State Board of Tax Com'rs, 174 N.Y. 417, 67 N.E. 69, 63 L.R.A. 884, 105 Am. St. Rep. 674; 12 R.C.L. p. 175. Thus the right to lay rail, or pipes, or string wires or set poles along a public street is not an ordinary business in which everyone may engage, or a use everyone may make of the street, but is a special privilege, a franchise to be granted for the accomplishment of public objects. They are required only in cases in which it is sought to impose upon the street a special burden which cannot be imposed generally, that is, to burden the street with a special privilege which the public generally may not likewise enjoy. Business such as that of the Airways does not so burden the street. It uses the streets only for purposes of travel and transport in the same manner as the public generally. It is a business not subject to franchise requirements."

The operations of Salt Lake City Lines at the present time is in all respects similar to the operation carried on and conducted by Airways in 1941. In fact it is a matter of common

knowledge, of which this court can take judicial notice, that Salt Lake City Lines acquired the operating rights and properties of Airways in addition to those of Utah Light & Traction Co. and now operates over the same routes as were operated by Airways at the time of the above entitled case. Furthermore, as has been pointed out above, on the routes formerly operated by Utah Light & Traction Company, Salt Lake City Lines has removed all rails, overhead trolleys and other equipment which burden the streets, and operates solely by means of motor busses. To use the language of this court in the case above cited: "It uses the streets only for purposes of travel and transport in the same manner as the public generally."

Certainly if Salt Lake City had no power to grant a franchise to Salt Lake City Lines, it would have no power to impose a tax in consideration of the purported granting of a franchise. Likewise, if the city had no power to grant a franchise for this type of operation, it could not meet the requirements of Sec. 10-8-80, U.C.A. 1953 as to uniformity by attempting to group Salt Lake City Lines into classification with other companies which the city did have the power to franchise. Salt Lake City Lines cannot be classified with the electric, gas or telephone utilities. It must be classified with other transport companies which use the streets in hauling passengers for hire, and must be taxed on the same basis as such other companies.

CONCLUSION

It is the position of appellant that the Ordinance of February 27, 1951 should be declared null and void. First,

because it never at any time became operative under its own terms because of the refusal of the plaintiff to accept the ordinance. Second, the gross receipts tax portion of the ordinance is invalid as it levies a tax which is not uniform in respect to the class upon which it is imposed. The case should be remanded to the District Court with directions to vacate the order of dismissal and to grant the plaintiff's motion for a summary judgment declaring invalid the Ordinance of February 27, 1951.

Respectfully submitted,

CALVIN L. RAMPTON
721 Continental Bank Bldg.
Salt Lake City, Utah

Attorney for Plaintiff and Appellant.