

1966

# Jack H. Bowman and Emmett Rigney, Dba Hustler'S Market v. Salt Lake City Corporation, A Municipal Corporation : Appellant's Brief

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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

UNIVERSITY OF UTAH

JACK H. BOWMAN and  
EMMETT RIGNEY, dba  
HUSTLER'S MARKET,

*Plaintiffs and Respondents,*

vs.

SALT LAKE CITY CORPORATION,  
a Municipal Corporation,

*Defendant and Appellant.*

**APPELLANT'S BRIEF**

AUG 25 1966

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Case No.

10535

**FILED**

APR 1 - 1966

Appeal from the Judgment of  
the Third District Court for Salt Lake County  
Honorable Albert H. Ellett, District Judge

State Supreme Court, Utah

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SEP 30 1966

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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JACK H. BOWMAN and  
EMMETT RIGNEY, dba  
HUSTLER'S MARKET,

*Plaintiffs and Respondents,*

vs

SALT LAKE CITY CORPORATION,  
a Municipal Corporation,

*Defendant and Appellant.*

Case No.  
10535

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## APPELLANT'S BRIEF

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### STATEMENT OF THE CASE

This appeal involves the question of whether Salt Lake City Ordinance, 20-5-1, et seq. is void and unenforceable.

### DISPOSITION IN LOWER COURT

This case was argued on stipulated facts to the Court and a final judgment was entered granting a permanent restraining order against enforcement of Salt Lake City Ordinance 20-5-1, et seq. declaring said ordinance void and unenforceable.

### RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the lower court's final judgment and judgment in its favor as a matter of law.

### STATEMENT OF FACTS

The Salt Lake City Ordinance, Title 20, Chapter 5, Sec. 1 through 16 provides as follows:

## AN ORDINANCE

AN ORDINANCE AMENDING Title 20 of the Revised Ordinances of Salt Lake City, Utah, 1955, relating to licenses, by adding thereto a new Chapter 5 to be entitled, "Closing Sale."

Be it ordained by the Board of Commissioners of Salt Lake City, Utah:

SECTION 1. That Title 20 of the Revised Ordinances of Salt Lake City, Utah, 1955, relating to licenses, be, and the same hereby is, amended by adding thereto a new Chapter 5 to be entitled, "Closing Sale," to read as follows:

## "CHAPTER 5

## "CLOSING SALE.

"Sec. 20-5-1. Definitions. As used in this chapter, the following terms shall have the meanings herein stated:

"(1) SALE. "Sale" shall mean:

"(a) Any sale of, or any offer to sell to the public or any group thereof, goods, wares or merchandise on order, in transit or in stock, in connection with a declared purpose as set forth by advertising that such sale is anticipatory to or for the purpose of termination, liquidation, revision, windup, anticipatory removal, dissolution or abandonment of the business or that portion of the business conducted at any location; and

"(b) All sales advertised in any manner calculated to convey to the public the belief that upon the disposal of the goods to be placed on sale, the business or that portion thereof being conducted at any location will cease, be removed, interrupted, discontinued or changed; and



“(c) All sales advertised to be ‘Adjustor’s Sale,’ ‘Assignee’s Sale,’ ‘Administrator’s Sale,’ ‘Closing Sale,’ ‘Creditor’s Sale,’ ‘End Sale,’ ‘Forced Out of Business Sale,’ ‘Going Out of Business Sale,’ ‘Insurance Salvage Sale,’ ‘Last Days Sale,’ ‘Lease Expires Sale,’ ‘Liquidation Sale,’ ‘Removal Sale,’ ‘Reorganization Sale,’ ‘Quitting Business Sale,’ ‘We Quit Sale,’ ‘Wholesale Closing Out Sale,’ ‘Fixtures for Sale,’ or advertised by any other expression or characterization or phrase of like or similar language which would reasonably convey to the public that the sale is being conducted as a result of such occurrences as enumerated above, which are not intended to be all inclusive but refer to type or class of sale.

“(2) PUBLISH, PUBLISHING, ADVERTISE-  
MENT, ADVERTISING. ‘Publish,’ ‘publishing,’ ‘advertisement,’ ‘advertising’ shall mean any and all means of conveying to the public notice of sale or notice of intention to conduct a sale, whether by word of mouth, newspaper advertisement, magazine advertisement, handbill, written notice, printed notice, printed display, billboard display, poster, radio, or television announcement and any and all means including oral, written or printed.

“Sec. 20-5-2. License required. It shall be unlawful for any person to publish or conduct any sale as defined in this chapter without first obtaining a license to do so. This license shall be in addition to any other license which may be required by any other ordinances.

“Sec. 20-5-3. Fee. The fee for the license required by the preceding section shall be Twenty-Five and 00/000 (\$25.00) Dollars.

“Sec. 20-5-4. Application. Application for such license shall be in writing, executed by the applicant

under oath and shall contain the following information:

“(1) Type of sale to be conducted and reason for conducting such sale.

“(2) A description of the place where such sale is to be held.

“(3) The nature of the occupancy, whether by lease or sublease, and the date of termination of such occupancy.

“(4) The means to be employed in publishing such sale, together with the text of any and all proposed advertising matter.

“(5) An itemized list of the goods, wares and merchandise to be offered for sale, including those on order and not received.

“(6) Where and from whom such stock was purchased or acquired; and, if not purchased, the manner of such acquisition.

“(7) Any additional information that the license assessor and collector may require.

“Sec. 20-5-5. Year in business required prior to issuance of license. Exception. No person, company or corporation shall be eligible for a license nor shall a license be issued to any person, company or corporation unless they shall have been previously licensed to do business at the same location of such closing sale for the 365-day period immediately preceding the beginning of the said sale except in those instances where a bona fide hardship would be created and in such instances proof must be furnished to the license assessor and collector that:

“(1) Such hardship exists; and

“(2) At the conclusion of such closing sale all and any business transactions of that particular applicant will completely and permanently cease and desist.

“Sec. 20-5-6. Issuance of license and term. Upon the filing of an application and a finding by the license assessor and collector after investigation that the statements contained therein appear to be true and are not false, fraudulent, deceptive or misleading in any respect, a license shall be issued for a period not exceeding thirty (30) days, upon the payment of the fee herein prescribed.

“Sec. 20-5-7. Renewals. Term and fee. Upon satisfactory proof by the licensee that the stock itemized in the original application has not been entirely disposed of, the license assessor and collector shall renew such license for a period of not exceeding thirty (30) days. In no event shall a license be renewed more than twice. For each renewal a fee of Ten and 00/00 (\$10.00) Dollars shall be collected.

“Sec. 20-5-8. Display of license. Upon commencement of any sale, and for the duration thereof, the license therefor shall be conspicuously displayed near the entrance to the premises.

“Sec. 20-5-9. Revocation of license. A license granted pursuant to this chapter may be revoked by the license assessor and collector if:

“(1) The licensee has failed to include in the inventory required by the provisions of this chapter the goods, wares and merchandise, or any part thereof, required to be contained in such inventory.

“(2) The licensee has added, caused to be added or permitted to be added, any goods, wares or merchandise not described in the original inventory.

"(3) The licensee has violated any of the provisions of this chapter or of the laws pertaining to advertising.

"Sec. 20-5-10. Rules and regulations. The license assessor and collector may make such rules and regulations for the conduct and advertisement of the sales defined in this chapter as may be necessary to carry out the purposes thereof. Such rules and regulations must be submitted to and be approved by the board of city commissioners.

"Sec. 20-5-11. Mingling of goods prohibited. No person contemplating conducting any sale as defined in this chapter or during the continuance of such sale shall order any goods, wares or merchandise for the purpose of selling them at such sale; and any unusual purchase or addition to the stock of such goods, wares, or merchandise within sixty (60) days before the filing of such application for a license to conduct such sale shall be presumptive evidence that such purchase or addition was made in contemplation of such sale and for the purpose of selling it at such a sale.

"Sec. 20-5-12. Each sale separate offense. Each sale made without a license and each sale of goods, wares or merchandise that is not inventoried and described in the original application shall constitute a separate offense under this chapter.

"Sec. 20-5-13. Resumption of business prohibited. No person shall, upon the conclusion of any sale herein defined, continue to conduct a business or business operation of the same or similar nature to that for the discontinuance of which such license was issued at the same premises; nor shall such person within one (1) year after conclusion of such sale resume such business at the same premises.

"Sec. 20-5-14. Records to be kept. The licensee shall keep suitable books and records and make them available at all times to the city license assessor and collector.

"Sec. 20-5-15. Exemptions to chapter. The following persons shall be exempt from the scope and operation of this chapter:

"(1) Persons acting pursuant to an order or process of a court of competent jurisdiction.

"(2) Persons acting in accordance with their powers and duties as public officers such as sheriffs and marshals.

"Sec. 20-5-16. Compliance with chapter required. It shall be unlawful for any person to violate or fail to comply with any of the provisions of this chapter or any rule or regulation adopted pursuant thereto."

SECTION 2. In the opinion of the Board of Commissioners, it is necessary for the peace, health and safety of the inhabitants of Salt Lake City, Utah, that this ordinance become effective immediately.

SECTION 3. This ordinance shall take effect upon its first publication.

Passed by the Board of Commissioners of Salt Lake City, Utah, this 5th day of March, 1964.

J. BRACKEN LEE,  
Mayor.

HERMAN J. HOGENSEN,  
City Recorder.

Bill No. 16 of 1964.

Published March 12, 1964.

(C-32)

Respondent Emmett Rigney commenced the business of Hustler's Market at 958 North Eighth West Street, Salt Lake City, Utah, about March, 1964, and from that date to approximately October, 1965, suffered a continuous financial loss. Respondent Rigney determined to cease doing business and in November, 1965, contacted Respondent Jack H. Bowman to purchase Rigney's grocery stock and conduct a "closing out sale" with the understanding that Respondent Bowman was to purchase additional merchandise inventory for purposes of selling at final sale. On about November 28, 1965, Respondents were contacted by the City Licensing Department and were informed of the provisions of Salt Lake City Ordinance heretofore set out.

Respondents being aware that their intentions were not in conformance with the ordinance determined it to be a useless act to apply for the license and decided to obtain a declaratory judgment of validity or invalidity of such ordinance.

Plaintiffs have advertised the "quitting business sale" at the said Hustler's Market and Appellant by stipulation, does not contend that there was anything false or fraudulent in the advertising as such advertisement may pertain to the prices and the commodities listed therein. However, the Appellant does suggest that the full page ad with the caption across the top of the advertisement, "HUSTLER'S MARKET QUIT - GIGANTIC CLOSE OUT SALE - YOUR GAIN - SAVE - SAVE - SAVE," even with the information at the very bottom of the ad in small print that, "Stock will be supplemented to meet demand", is calculated to mislead the public. On Page 9

# HUSTLERS MARKET

ROSE PARK STORE ONLY  
938 NORTH 8th WEST

# QUITS!

**GIGANTIC CLOSEOUT SALE—YOUR GAIN  
SAVE—SAVE—SAVE—SAVE—SAVE—SAVE—SAVE**

<b>MOTOR OIL</b> 4 \$1	<b>ANTI FREEZE</b> \$1.47	<b>NYLONS</b> 4 \$1	<b>COOKIES</b> 4 \$1	<b>COCKTAIL</b> 8 \$1
<b>TOMATO JUICE</b> REGULAR 35¢ 46-oz. Cans 5 \$1	<b>FRESH GRADE 'A' FRYERS</b> 25¢ lb.			

<b>GROUND BEEF</b> 4 \$1	<b>LEG O' MUTTON</b> 29¢ lb.	<b>MILD CHEESE</b> 39¢ lb.	<b>FRANKS</b> 3 89¢
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<b>ELECTRIC KNIFE</b> \$10.97	<b>YAMS</b> 2¢ lb.	<b>IRON</b> \$1.94	<b>BLEACH</b> 39¢	<b>TOOTH BRUSH</b> \$12.00
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<b>BOOK MATCHES</b> 10¢	<b>PURE PRESERVES</b> 49¢	<b>SWEET PICKLES</b> 39¢
<b>TOMATO SAUCE</b> 17 \$1	<b>STEAK SALE</b> 66¢ lb.	<b>TIDE</b> 59¢
<b>PINEAPPLE JUICE</b> 10 \$1		<b>COCOA</b> 49¢
<b>TOMATO PASTE</b> 12 \$1		<b>PINEAPPLE</b> 3 \$1
<b>PANCAKE SYRUP</b> 3 \$1.00		<b>BULK PINTO BEANS</b> 8 \$1

**NATIONAL BRANDS  
COFFEE**  
3 \$1.98  
LB. CAN

**HUSTLERS MARKET**  
ROSE PARK STORE ONLY  
938 NORTH 8th WEST  
STOCK WILL BE FRESHENED  
TO MEET DEMAND

**CANNED FRUITS**  
CLOSE-OUT  
5 95¢  
2 1/2 SIZE CANS

is a representative and typical advertisement Respondents continually used, said fact having been stipulated to.

## ARGUMENT

### POINT I

MUNICIPAL CORPORATIONS ARE EMPOWERED TO ENACT ORDINANCES PROVIDING FOR, AMONG OTHER THINGS, THE REASONABLE, PROPER AND NECESSARY REGULATIONS OF A PARTICULAR CALLING OR BUSINESS AND THE GENERAL WELFARE OF THE PUBLIC.

It is submitted that such power is expressly conferred by statute. Title 10, Chapter 8, Section 39, 1953 Utah Code Annotated shows the following authority for municipal power:

“ . . . they may license, tax and regulate the business conducted by merchants, wholesalers and retailers, shopkeepers and storekeepers . . . ”

The above section was held to confer power on the city municipality to “regulate” a particular calling or business. The test given for the validity of such “regulation” is that it is such:

“ . . . reasonable regulation as may be deemed necessary and wholesome in conducting the business in a proper and orderly manner . . . ” Salt Lake City vs. Revene, 101 Utah 504, 124 Pacific 2nd 537.

Title 10, Chapter 8, Section 84, 1953 Utah Code Annotated gives municipalities the following additional powers:



"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 convenience of the city and the inhabitants thereof . . ."

The above cited section is known and referred to as the "General Welfare Clause". *Bohn v. Salt Lake City*, 8 Pacific 2nd 591.

It can't be argued that the city may not pass ordinances designed to protect the public welfare and promote the public prosperity or that the city can not regulate the affairs of business by city ordinance; it can only be argued that a particular ordinance or regulation is unreasonable and improper, thereby becoming an unreasonable extension of the proper exercise of police power.

## POINT II

THE CITY ORDINANCE, 20-5-1 DESIGNATED, "CLOSING SALE", COVERING, " . . . MERCHANTS, WHOLESALEERS AND RETAILERS, SHOPKEEPERS AND STOREKEEPERS . . . " IS A REASONABLE AND PROPER "REGULATION" TO PROMOTE "PUBLIC PROSPERITY", AND TO PROTECT "PUBLIC WELFARE" AND HENCE WITHIN THE STATUTORY PEROGATIVE OF THE POLICE POWERS EXTENDED TO SALT LAKE CITY.

- (a) The "Closing Sale" ordinance is authorized by expressly delegated power given to the municipality to "license, tax and regulate", business and is not, therefore, ultra vires.

The ordinance in question is not ultra vires. In the case of *Ritholz vs. City of Salt Lake*, cited as 3 Utah 2nd 385, 284 Pacific 2nd 704, this court held that a city ordinance prohibiting price advertising of prescription eyeglasses was invalid. The *Ritholz* case was held to be controlling by the lower court in this present appeal. In regard to the issues as to whether the ordinance was ultra vires in the *Ritholz* case, the court said it was void for unreasonableness but that the city had authority to regulate a "particular calling or business" and never did specifically hold that the ordinance was ultra vires:

" . . . The court has generally adhered to a policy of rather strictly limiting the extension of the powers of a city by implication. Plaintiff urges that because of this commitment we should hold the ordinance invalid since there is no express authority delegated to the city relative to advertising eyeglasses. *It is pointed out, however, that the powers relied on by the city in enacting this ordinance are the expressly delegated powers to 'license, tax and regulate . . . the business conducted by merchants, wholesales and retailers, shopkeepers and storekeepers . . . '* (emphasis added), to preserve the safety, health and morals of the city and to safeguard the general health of the inhabitants. We stated in *Ogden City vs. Leo* that, 'where the power to regulate a particular calling or business is conferred on a city, it authorizes such city to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed neces-

sary and wholesome in conducting the business in a proper and orderly manner.'

In this particular context the power to regulate business can mean only such regulations as are reasonable and substantially related to the safeguarding of the public health which raises the question whether the advertising prescribed by the ordinance bears such a relation."

It should be noted that in the above cited holding, the Court was there faced with the health provision of the statute while in the instant case we are dealing with the general welfare and prosperity clause portion of the statute and the same principle must be applied to both portions of the statute. Therefore, it must be conceded that the ordinance is not *ultra vires per se*; the ordinance must be found to be an unreasonable and improper regulation of business to fail.

The city, in enacting the present ordinance relies on the expressly delegated powers to "license, tax and regulate . . . the business conducted by merchants, wholesalers and retailers, shopkeepers and storekeepers . . . ", "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 convenience of the city and the inhabitants thereof, and for the protection of property therein . . . ". For the ordinance in question to be *ultra vires*, it must be found that the city did not have the express or implied power to "license, tax or regulate" the "particular calling or business" covered by the ordinance in question. The issue as to whether the instant ordinance is such "reasonable and proper regulation" as may be "deemed necessary and wholesome in

conducting the business in a proper and orderly manner" is a valid question running to whether the ordinance is arbitrary or unreasonable regulation of an expressly delegated authority and is not an ultra vires issue strictly speaking in the modern use of the term as defined by Black's Law Dictionary, Fourth Edition, 1951, page 1692:

"Ultra Vires. While the phrase 'ultra vires' has been used to designate, not only acts beyond the express and implied powers of a corporation, but also acts, contrary to public policy or contrary to some express statute prohibiting them, the latter class of acts is now termed illegal and the 'ultra vires' confined to the former class."

- (b) The courts are bound by a strong presumption of validity of a municipal ordinance.

In the case of *Ogden City vs. Leo*, 55 Utah 556, 182 Pacific 532, it was held that a city ordinance regulating restaurants or public eating places was valid and this court there cited the general rule as related to presumption of validity of a municipal ordinance:

"It is generally presumed that conditions exist which make ordinances necessary or proper for the welfare of the community."

See also *McCune vs. City of Phoenix*, 317 Pacific 2nd 537, 83 Arizona 98; 62 CJS Municipal Corporation Section 208; *McClain vs. City of South Pasadena*, 318 Pacific 2nd 199, 155 Ca. 2nd 423; *City of Portland vs. Stevens*, 178 Pacific 2nd 173, 180 Oregon 514.

It has been argued in some of the cases, *Salt Lake City vs. Revene*, 124 Pacific 2nd 537, 101 Utah 504, and *Ritholz*

vs. City of Salt Lake, 3 Utah 2nd 385, 284 Pacific 2nd 702; that the ordinances should be strictly construed as to the *untra vires* question. A close reading of the just cited cases and the *Leo vs. Ogden City* case cited *supra* and the cases citing the general rule that a "presumption of validity" of an ordinance, clearly indicate that the general rule of strictly construing ordinances and statutes passed by cities operating under delegated powers is a rule applicable only under such conditions where there is no express or implied delegated power to "license, tax and regulate" a "certain calling or business". For example if a statute expressly authorized a city to license merchants, but said nothing about regulating them, the ordinance regulating merchants through the licensing power would be strictly construed, but an ordinance allowing a license fee would carry with it a presumption of validity unless it was clearly shown that the license fee was unreasonable.

Thus in the instant case the closing business ordinance of Salt Lake City is authorized under the expressly delegated power to "regulate" a "particular calling or business" and said ordinance must be presumed to be necessary for the welfare of the community unless and until it is clearly shown to be an unreasonable regulation or in violation of constitutional rights.

This court in the *Salt Lake City vs. Revene* case cited *supra* is authority for the above. There is some confusion created by dictum in the opinion and in this case, the court held that:

" . . . an ordinance fixing hours of a barber shop business was not a reasonable regulation of said business

and hence invalid in that the ordinance bore no reasonable relationship to the protection of the public."

The court distinguished between hours of regulation of a butcher shop as being reasonable and the regulation of hours of a barber shop as being unreasonable. The court was undoubtedly correct in such a distinction. Unfortunately, however, they added the following:

"... While we think the question not free from doubt, we elect to follow the line of cases above set out especially in view of the principle that any fair, reasonable substantial doubt concerning the *existence of the power* (emphasis added) is resolved by the courts against the corporation (city) and the power denied. 1 Dillon, Municipal Corporation, 5th edition, page 449, Section 237."

It is obvious that this rule is a correct rule, but is inapplicable in the barbershop case as well as in the instant case. The existence of the power to regulate was not being questioned, only the reasonableness. In the butcher shop case, the court thought it was reasonable regulation, but unreasonable in the barber shop case.

Where there is any "fair, reasonable, substantial doubt concerning the existence of the power itself the presumption is that there is no power but where the power is expressly delegated such as the power to "regulate" a "particular calling or business," there is a presumption that the ordinance is valid and may be declared invalid only by a clear showing that it is an unreasonable regulation and/or unconstitutional.

It also has been argued that although there is an expressly delegated authority to "regulate" a "particular calling or business" there is no express authority for a closing business sale ordinance and hence no presumption. Therefore the ordinance should be strictly construed. In the *Salt Lake City vs. Bennion Gas & Oil Company*, 80 Utah 53, 15 Pacific 2nd 648; a city ordinance was attacked which provided for the charging of fees for inspection of oil and gas business. The court there held:

"It is not necessary that the statute should specifically give to the municipality power to charge and collect a fee to cover the cost of inspection and regulation. Where the authority is lodged in the municipality to inspect and regulate, the further authority to charge a reasonable fee to cover the cost of the inspection and regulation will be implied."

The following authorities are also cited as holding that the courts were bound by a strong presumption of validity of a municipal ordinance. *Hopkins vs. Galland Mercantile Laundry Company*, 21 Pacific 2nd 553, (California 1933); *Sunny Slope Water Company vs. City of Pasadena*, 33 Pacific 2nd 672 (California 1934); *Skalko vs. City of Sunnyvale*, 91 Pacific 2nd 166, 93 Pacific 2nd 93 (California 1939); *City of Spokane vs. Coon*, 100 Pacific 2nd 36, (Washington 1940).

Also in *State vs. Atchison* reported in 92 Kansas 431, 140 Pacific 873, Ann. Cas. 1916 b at page 504 states:

"It is generally presumed that conditions exist which make ordinances necessary and proper for the welfare of the community."

The same thought is expressed in another form in *Seattle vs. Hurst*, 15 Washington 424, 97 Pacific 454; 18 LRA NS) 169, where the following language is adopted from Herr and Bennis Municipal Police Ordinance Section 127:

“An ordinance to be void for unreasonableness must be plainly and clearly unreasonable. There must be evidence of weight.”

- (c) That Salt Lake City ordinance Title 20 Chapter 5 covering licensing of “Closing Out Sale” serves a definite purpose in protecting the consumer public and business community and therefore promotes the public welfare.

Salt Lake City’s ordinance regulating “Closing Out Sales” is very narrow in its application. To the bona-fide business man who is desirous of legitimately closing up shop, the ordinance causes no burden. The very nature of the ordinance is to protect the public and the business community from individuals who would defraud the consumer. The ordinance in no way regulates the method or manner of sale, it merely fixes a reasonable time in which to complete the sale, designates the goods which may be sold as the goods on hand or ordered in the merchant’s inventory and the sale advertising material and method. The ordinance in no way controls operation of the business or of a sale by a business which is not being discontinued.

For many years past, it has been an obviously recognized fact that a “Closing Out Sale” is a consumer’s opportunity to purchase merchandise at a bargain; that the merchant has decided to liquidate his inventory in the



quickest and most efficient way by reducing prices to his cost or even below so that all merchandise, even that which is slow to move, will be sold without continuing in business and incurring high overhead with a diminishing return due to a limited inventory.

In the past the community has witnessed an imposition upon the consuming public and businessmen by the individual or company who is in the "going out of business", business. It is expected that, when a merchant "quits" business or vacates a selling location, the merchandise to be sold is of like quality to that which was sold in establishing the general reputation of the business. Unprincipled individuals have therefore taken advantage of the public by purchasing inferior merchandise both before and during the sale and then selling it without disclosing the inferior quality. There have been many occasions where the inferior merchandise at closing out sales has been sold at the normal retail selling price maintained by competing merchants. The public is further prejudiced by the implied and generally stated fact that all sales are final and the consumer therefore has no recourse when the inferior merchandise proves non-servicable. It has been the experience of the community that many businesses have been established for a short duration and then have gone through a "going out of business sale" sometimes lasting a year or more. Upon reflection one can only conclude that the establishment of the business was for the sole purpose of "going out of business" thus luring the public to their premises by misrepresentation, while during such sales the display cases and shelves continue well stocked with the almost daily arrival of new merchandise purchased to assist in "going out of business".

Although it would appear that the only damage is to the unsuspecting consumer the greater damage in the long run is to the business community. Should such fraudulent practices be allowed to continue unchecked, the consuming public will ultimately become well advised of the disadvantages of such sales and avoid them. But what about the business community? Businesses generally close down and quit because of two prime reasons. First, the business is not economical in operation and generally the liabilities exceed the assets. Thus such "closing out sales" are to satisfy creditors. Secondly, the operator simply desires to quit and recoup his investment which he may use for retirement or new ventures. In either case, should the consuming public become disillusioned with "closing out sales" the proceeds from such legitimate sales will be impaired. In the first instance the creditors may be irreparably damaged in an already unpleasant condition. In the second case a merchant may be severely harmed in that his return of capital will be at a considerable loss compared to the initial investment.

A further detriment to the business community in general and competing businesses in particular is the diverting of consumers from reputable and established firms because of the unfair competition practiced by the "going out of business" business.

The ordinance will promote public confidence in the advertising of such sales, in that it will tend to bring about an acceptance of such advertisements as being genuine.

The purpose therefore of the ordinance is simply to assure the public that the business is indeed "closing out."

An honest business man should have no complaints and will not be unduly regulated by the ordinance. It must be concluded from the above that this ordinance is a reasonable and proper regulation of "quitting business sales" and is substantially related to the safe guarding of the public welfare. It also must be pointed out that the ordinance is not a prohibitive ordinance such as in the Ritholz Case but is a regulatory one affecting only those merchants who are making a business of "going out of business sales", to the detriment of the public.

### POINT III

THE SALT LAKE CITY "CLOSING SALES" ORDINANCE CONSTITUTES A VALID EXERCISE OF POLICE POWER AND DOES NOT DEPRIVE RESPONDENTS OF THEIR CONSTITUTIONAL RIGHTS.

Consistent with the instant ordinance is the following general rule as cited in 37 Am. Jur. Sec. 305:

"Municipal corporations under authorized grants of police power emanating directly from constitutional provisions or from grants from the state legislature by way of . . . specific state statutes may regulate any trade, occupation, calling or business, the unrestrained pursuit of which might affect injuriously, the public health, morals, safety, comfort or welfare, or might result in fraud or imposition on the public. The courts have stated that regulatory powers of such nature are so well recognized and established as to be beyond question."

The court below in the instant case held that the going

out of business ordinance was void basing its rulings on the law espoused in *Ritholz vs. City of Salt Lake*, cited supra. There this court held that:

“We are of the opinion that it (ordinance) does not have any substantial bearing on public health as to justify this extension of the police power into the regulation of private business and the violation of the right to freely advertise in and sell one’s property.”

It must be pointed out that in the *Ritholz* case the “Ordinance forbids all advertising of prices of prescription eyewear”.

The *Ritholz* case therefore can be clearly distinguished from the case at bar in that the ordinance in the *Ritholz* case has an arbitrary prohibition of advertising of prices for prescription eyewear; whereas in the instant case we have a regulatory ordinance controlling “quitting business sales”. The standard or test which is applied to the question of constitutionality of an ordinance is much more stringent when that ordinance is a prohibitory ordinance than when it is merely regulatory. See 11 Am. Jur. Section 281.

In the case of *Eskind vs. City of Vero Beach*, 159 South 2nd 209, the Florida Supreme Court held that a city ordinance restricting the use of outdoor advertising for rates of motels was unconstitutional and gave as one of the tests in determining the reasonableness of the ordinance the consideration of the: “Effect of such legislation on the rights of citizens from the aspect of its practical impact.”

The practical effect of the ordinance in the *Ritholz* case is a literal prohibition of admittedly legitimate advertis-

ing whereas in the present case we have a reasonable regulation of going out of business sale advertising.

A New York City ordinance similar to the ordinance in question here was upheld in the face of an attack on its constitutionality. *Windsor Madison Corporation vs. O'Connell*, 172 New York Supplement 2nd 198, 9 misc. 2nd 1087, by the New York Supreme Court and also *People vs. Windsor Madison*, 173 New York Supplement 2nd 964. In the first of the two cases cited the New York City License Commissioner denied a license to conduct "going out of business" sale to a haberdasher who did not wait for issuance of license before displaying signs appropriate to such sale. In determining the constitutionality of the "going out of business" ordinance, the New York Supreme Court stated:

"It is said that the provisions of the administrative code . . . contravene the constitution in that they deprive the plaintiff of property without due process and interfere with its right of speech. The plaintiff is not deprived of any property, nor is any property right interfered with. It is not being restricted in sale of its goods nor is it being limited in respect to prices it may charge. *The only restriction is on calling its sales a closing out sale or giving it some similar designation.*

No property right is involved. Nor is free speech, except in a fanciful sense, concerned in the problem. It is well recognized that the police power extends to the regulation of advertising that may mislead the public. The conditions which gave rise to the code article are well known. The public was being induced by unscrupulous merchants to make purchases under the belief that stocks of goods were being sold at

sacrifice prices. A favored device was by distress advertising displayed on the store that the proprietor was going out of business for one cause or another. *To prevent fraud by limiting such sales to instances where the representations were bona fide is not an interference with free speech.*" (Emphasis added)

In the case of *People vs. Windsor Madison*, 173 New York Supplement 2nd 964, a case arising out of the same ordinance and the same occasion as the above cited case, the New York Magistrate speaking in that case states as follows:

"The statute does not interfere with defendant's right to sell its goods, nor does it impair its freedom to determine the price at which it will sell them. The restrictions imposed by the statute are no more drastic than is reasonable to accomplish the end for which the law was adopted.

The court goes on to say:

"It follows therefore the enforcement of the statute here in question constitutes a valid exercise of a valid police power and does not deprive defendant of property without due process of law."

Also applicable to the issue here is the general rule of law as stated in 11 Am. Jur. Sec. 281 in regard to the constitutionality of regulation of auction sales:

"The state may forbid auction sales at certain times such as at night, and in certain places, particularly with reference to such types of merchandise as jewelry, and may in other instances hedge about such transactions with regulations conducive to the pre-

vention of imposition. In any event such fraud preventing regulation must be reasonable, and if regulation alone will afford the requisite protection, absolute prohibition is unconstitutional." (See also 53 ALR 2nd 1433 and 39 ALR 760, 766)

## CONCLUSION

The power relied on by Salt Lake City in enacting the "closing sale" ordinance is the expressly delegated power to, "license, tax and regulate . . . the business conducted by merchants . . . to provide for the peace and good order, comfort and convenience", of the public.

Under this delegated authority there is no question that the ordinance is *not* ultra vires but is clearly within the police powers extended to Salt Lake City by statute.

There is no question that this regulatory ordinance is an expressly delegated power and unless found to be an unreasonable and improper regulation of an expressly delegated authority cannot fail by reason of being ultra vires.

As to the issue of reasonableness of the regulation in the case of an expressly delegated authority as we have here the court is bound by strong presumption of validity and as quoted supra from the Ogden City vs. Leo:

"It is generally presumed that the conditions exist which make ordinances necessary or proper for the welfare of the community".

The imposition on the public of those who make a business of "going out of business" is a "substantial" evil which the present ordinance reasonably regulates and

must be presumed to be necessary for the welfare of the community. Although in the instant case Respondents in their advertisement pertaining to prices and commodities practiced no fraud or falsehood and were actually closing business within a 90 day period the advertisement was directed at taking advantage of the drawing power to the public of a "going out of business" sale when in fact the sole purpose was other than a completely bona fide "Quitting business" sale.

The New York Supreme Court held a similar New York City Ordinance constitutional as a reasonable extension of the police power noting that the ordinance only forbids the merchant calling his sale a "closing sale" unless he conforms to the ordinance.

In taking into consideration the balance between the imposition on the public and the limitation on constitutional rights by not allowing Respondents to call their sale a "closing sale" or some other similar designation without compliance with the instant ordinance, is clearly weighted in favor of the welfare and prosperity of the community at large and therefore should be held to be a constitutional and valid exercise of the police power by Salt Lake City.

Respectfully submitted,

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