1967

Salt Lake City, A Municipal Corporation of the State of Utah v. Towne House Athletic Club and The University Club : Brief of Respondents-Defendants

IN THE SUPREME COURT
of the
STATE OF UTAH

SALT LAKE CITY, a Municipal Corporation of the State of Utah,
Appellant and Plaintiff,
- vs. -
TOWNE HOUSE ATHLETIC CLUB and THE UNIVERSITY CLUB,
Respondents and Defendants.

Case No. 10640

BRIEF OF RESPONDENTS-DEFENDANTS

Appeal from Summary Judgment
of the Third Judicial District
Court for Salt Lake County, Utah
Honorable Bryant H. Croft, Judge

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NATURE OF THE CASE

Plaintiff brought an action in the District Court of Salt Lake County to collect a restaurant license fee from the defendants.

DISPOSITION IN THE LOWER COURT

Defendants' motion for Summary Judgment was granted in part, and the Complaint of the plaintiff was dismissed. The court held that the state had not pre-empted to itself the right to license and regulate the defendants but dismissed plaintiff's Complaint because it had failed to enact a proper ordinance to license and regulate the defendants.

RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of that portion of

the judgment of the lower court dismissing plaintiff's Complaint. Defendants seek reversal of that portion of the judgment wherein the court held that the state of Utah had not pre-empted to itself the right to license and regulate these defendants for the reason that it is clear as a matter of law from the statutes that the plaintiff has no right to license, charge a license fee or regulate the defendants. The defendants request this court to direct the lower court to enter its order decreeing that the plaintiff does not have a right to license, charge a license fee or regulate the defendants.

STATEMENT OF FACTS

A stipulation of facts involved in this case was entered into between the plaintiff and defendants on the 18th day of November, 1965 (R9) and has been quoted in full in plaintiff's Statement of Facts and defendants agree with the plaintiff's Statement of the Facts wherein it sets forth this stipulation.

ARGUMENT

POINT I

THE SUMMARY JUDGMENT OF THE COURT BELOW, DETERMINING THAT THE PLAINTIFF MAY NOT IMPOSE A RESTAURANT LICENSE AND CHARGE A LICENSE FEE UPON THE DEFENDANTS WHO ARE PRIVATE, NON-PROFIT INCORPORATED SOCIAL CLUBS IS CORRECT AND SHOULD BE SUSTAINED.

The plaintiff seeks to impose a restaurant fee on the defendants and relies upon the following state statutes for its authority:

Section 10-8-39, *Utah Code Annotated*, 1953, as amended which empowers the city to license, tax and regulate . . . boarding houses, restaurants, eating houses; . . .

Section 10-8-80, *Utah Code Annotated*, 1953, as amended which grants to cities the right to raise revenue by levying and collecting a license fee or tax on any *business* within the limits of the city; and . . . (Emphasis ours)

Section 10-8-81, *Utah Code Annotated*, 1953, as amended, states as follows:

> "They may regulate all social clubs, recreational associations, athletic associations and kindred associations, whether incorporated or not, which maintain club rooms or regular meeting rooms within the corporate limits of the city"

The city ordinance upon which plaintiff relies is Section 20-2-62 of the Revised Ordinances of Salt Lake City, 1955, which ordinance imposes a license fee on restaurants. The ordinance defines the term "restaurant" as being any place where food or drink is prepared, served, or offered for sale or sold for human consumption on or off the premises. The Utah State Statute from which the city derives its authority to enact such an ordinance does not define the term "restaurant."

Since the Legislature did not define this term, we must look to case law to determine what in the absence of legislative definition, constitutes a "res-

taurant." The case law on the subject has been summarized in an opinion by the Salt Lake City Attorney, dated December 18, 1958. The author of that opinion came to the following conclusion:

> "An examination of the cases defining 'restaurant leads one to the conclusion that it is such an establishment as ordinarily serves meals and drinks to the public generally. An Illinois case, *Holzen v. Chicago*, 22 Ill. App. 50, 136 N.E. 594, quotes from Webster's definition of a restaurant as 'an establishment where refreshments or meals may be procured by the public; a public eating house.' Other cases so holding are *Jackson v. Lane*, 142 N.J. Eq. 193, 59 A.2d 662; *Donahue v. Conant*, 102 Vt. 108, 146 A. 417; *Food Corporation v. Zoning Board of Adjustment of City of Philadelphia*, 384 Pa. 288, 121 A.2d 94; *City of Flordell Hills v. Herdekopf*, Mo. App., 271 S.W. 2d 256; *San Francisco v. Larson*, 165 Cal. 179, 131 Pac. 366. And it has been said to mean where *any person* who conducts himself properly and is able and willing to pay for same 'has a right to demand that food be furnished him.' (Emphasis Added.) *Debenham v. Short*, Tex. Civ. App., 199 S.W. 1147. See Annotation in 122 A.L.R. 1399."

With this conclusion, the defendants are in complete accord and this conclusion is substantiated by several cases decided subsequent to the City Attorney's opinion defining "restaurant" as an establishment where refreshments or meals may be procured by the public; meaning a public eating house. *Drucker vs. Frisina*, 210 N.Y.S. 2d, 680, 681, 31 Misc. 2d,

169. *Appeal of Langol*, 104 A.2d, 343, 346, 175 Pa. Super, 320.

Based upon the cases above referred to, the Salt Lake City Attorney, in his December 18, 1958 opinion, came to the conclusion that clubs, such as the defendants, which provide meals to their members and guests only (which has been stipulated to by the plaintiff) (R9) do not come within the generally accepted definition of "boarding house," "restaurant" and "eating house" as contained in Section 10-8-39, Utah Code Annotated, 1953, as amended. Again we can agree with the opinion of the former Salt Lake City Attorney. Therefore, the ordinance under which Salt Lake City is attempting to license the defendants cannot and does not apply to social and athletic clubs which are not restaurants within the purview of the statute creating the authorization for the city to pass its restaurant ordinance.

This conclusion is further substantiated by the fact that the Legislature has recognized in Section 10-8-81, Utah Code Annotated, 1953, as amended, that social clubs and athletic associations are unique entities in and of themselves. The Legislature would not have seen fit to provide that cities and towns might regulate all social clubs, recreational associations, athletic associations, and kindred associations if it were its intention to regulate them as restaurants or eating houses. If the Legislature had intended for the city to regulate each activity which may be carried on within a social and athletic club,

then it would not have seen fit to empower cities and towns to regulate the clubs in *toto*. To accept the city's position, would be to allow the city to circumvent the statute empowering it to regulate social and athletic associations and compound the license and tax on the social and athletic associations by allowing the city to license the clubs as restaurants, dance halls, bowling alleys, and shoe shine shops, etc., which has been attempted by the city in the past. The Legislature, however, understood that social and athletic clubs present a unique situation since their operations encompass several types of activities. The Legislature, therefore, provided the cities with authority to regulate social clubs and not dismember them into various parts. The Legislature did not authorize cities to regulate and license each activity. In 9 McQuillin, Municipal Corporations, Third Edition, Section 26-39, it states as follows:

> "Power to impose a license tax upon a business does not authorize a division of the business into its constituant elements, parts or incidents, and the levy of a separate tax on each element, part or incident thereof. A single taxable privilege may not be separated into its various component elements as ordinarily recognized, and a separate license tax imposed on each element. . . ."

The Plaintiff has never seen fit to enact an ordinance pursuant to the authority granted it under Section 10-8-81 to regulate social clubs and athletic

associations and, therefore, cannot demand a license fee in this case.

The case of *American Fork City vs. Robinson*, et al, 77 Utah 168, 292 Pac. 249, deals with an ordinance enacted by the city of American Fork which defined clubs and club rooms and made it unlawful for any person to play billiards or pool in any club room in the city. The defendants were tried and convicted of playing pool in the club room and appealed to the Supreme Court. In its opinion this Court stated:

> "That the powers of the city are strictly limited to those expressly granted, to those necessarily or fairly implied in or incident to the powers expressly granted, and to those essential to the declared objects and purposes of the corporation, it is settled law in this state. *Salt Lake City vs. Sutter*, 61 Utah, 533, 216 P. 234."
>
> "We therefore look to the legislative grants relied on to sustain the power to enact the ordinance in question."

The Court reversed the convictions on the ground that the power had not been given to the city to enact such an ordinance. The laws of the State of Utah had empowered city councils with the power to "license, tax, regulate, and suppress billiard, pool, bagatelle, pigeon hole, or any other tables or implements kept or used for similar purposes. * * *" The laws of the State of Utah also granted powers to the city councils to "regulate all social clubs, recreational

associations, athletic associations, and kindred associations, whether incorporated or not, which maintain club rooms or regular meeting rooms within the corporate limits of the city." The ordinance enacted, however, generally prohibited any person from playing at billiards or pool upon any billiard or pool table in any club room. This court therefore held that the ordinance was not essential to the power to regulate or suppress the keeping of such tables, and that under the applicable strict rule of construction, the power of the city to enact the ordinance was denied and the ordinance was held invalid.

The reverse situation is in existence in the case presently before the Court. The city has been given the power to enact an ordinance to regulate restaurants which it has done. However, these defendants are not restaurants. They are social clubs and athletic associations. The powers have been given to the cities to regulate some social clubs and athletic associations, but the city has not exercised this power and has not passed an ordinance pursuant to this legislative authority. Counsel for the plaintiff refers in his brief at page 7 to a "General Welfare Clause" and states that these powers, if granted, are as a rule designed to confer powers other than those specifically mentioned. Certainly if the city has authority to regulate these defendants, that power is specifically stated and there is no need to refer to a general welfare clause but there is a need to enact proper ordinance to put this power into effect. The

plaintiff also contends that in order to protect the public health, it is necessary for the city to have authority to license the defendants. These defendants certainly do not desire to create health hazards and have no objections to being inspected and supervised. They are in fact regulated under bond by the Utah Secretary of State. The question presented to this Court is not whether there should be regulation of these defendants, but whether they should be regulated by the Secretary of State. If the city has the authority to regulate and license these defendants, then by passing the proper ordinance such a purpose can be properly accomplished.

POINT II

THE DECISION OF THE LOWER COURT THAT THE STATE OF UTAH HAS NOT PRE-EMPTED TO ITSELF THE POWER TO REGULATE OR LICENSE THESE DEFENDANTS IS ERRONEOUS AND THE COURT SHOULD HAVE ENTERED ITS JUDGMENT DENYING TO THE PLAINTIFF THE RIGHT TO LICENSE OR REGULATE THESE DEFENDANTS.

The State has pre-empted to itself the right to regulate these defendants by virtue of Sections 16-6-13, 16-6-13.1, 16-6-13.2, 16-6-13.3 and 16-6-14, Utah Code Annotated, 1953, as amended. Under the terms of these statutes the Secretary of State of the State of Utah is charged with the duty to determine whether any social club, recreational or athletic association or kindred association incorporating under the provisions of that chapter is a bona fide club or association and whether the object of its existence

is for pecuniary profit. He is further charged to see that the clubs will not be used for permitting gambling or any other violation of law or ordinance and he is given the power to hold hearings for the purpose of determining whether a club or association is operating in accordance with the law. The clubs are also required by the statute to maintain a $5,000.00 bond with the Secretary of State conditioned upon the faithful performance of their obligations. In addition, Section 6-6-13.1 sets forth in specific detail fourteen different items which must be included in the constitution, bylaws and/or house rules of these non-profit social and athletic clubs. These provisions range over the full gamut of operations of a social and athletic club and are not limited to the narrow issue of the storage or consumption of liquor on the premises.

Under Section 16-6-14 the specific authorization is given to all police officers to have the right to enter the club rooms or meeting rooms of the social clubs, recreation or athletic associations or kindred associations incorporated under the provisions of the chapter *for the purpose of determining whether any laws or ordinances are being violated therein.* (Emphasis ours)

The sections of the Utah Code above referred to are part of the Utah Non-Profit Corporation Act, and create distinct and separate entities, known as social clubs, recreation, or athletic associations incorporated as non-profit corporations which are reg-

ulated by the Secretary of State of the State of Utah. The unique status of such entities was recognized by the Legislature when it enacted Chapter 24, section 1 Laws of Utah 1959 which was entitled "An act providing for the licensing and regulation of establishments, associations, and corporations that allow consumption and possession of liquor on their premises; and providing a penalty for violation."

Section 11-10-1 of that act as codified states:

> "Cities and towns within the corporate limits, and counties outside of corporate cities and towns shall license all establishments, associations and corporations, *except non-profit corporations bonded and regulated under provisions of sections* 16-6-13.1, 16-6-13.2 *and* 16-6-13.3, *Utah Code Annotated* 1953 *as enacted by Chapter* 25, *sections* 2, 3, *and* 4, *Laws of Utah* 1955 that operate a club, business or association which allows the customers, members or guests to possess or consume liquor on the premises, provided the license does not permit the licensee, operator or employee of either to hold, store, or possess liquor on the premises. However, nothing in this section shall be construed to prevent persons other than the licensee, operator or employees of either, from possessing and consuming, but not storing, liquor on premises, except as otherwise provided for by statute." (Emphasis ours.)

From the foregoing it is clear to see that the authority of the cities and towns and counties outside of cities and towns shall license all establishments, associations and corporations *except non-profit cor-*

porations bonded and regulated under the provisions of Sections 16-6-13.1, 16-6-13.2 and 16-6-13.3. These statutes which were enacted subsequently to Sec. 10-8-81 Utah Code Annotated 1953, as amended, circumscribe and limit the authority of cities and towns to license associations and corporations and specifically state that cities cannot license athletic clubs and social clubs, recreational or athletic associations, or kindred associations, which are nonprofit corporations bonded and regulated by the Secretary of State. The concern which the city expresses over the health problem can certainly be taken care of since the Secretary of State and police officers are given the authority to determine whether any ordinances of the cities where these clubs are located are being violated and can revoke their license for such violation and this authority is not given to the cities and towns but is specifically reserved to the Secretary of State. These defendants should not be required to be regulated by two masters nor to pay license fees or taxes for services of inspection done by the city when they are paying them to the Secretary of State, who by law is required to regulate them. If the city feels that it should regulate these defendants, its recourse is to the legislature and not to the court.

CONCLUSION

The decision of the lower court, dismissing the plaintiff's Complaint, should be affirmed. Insofar,

however, as the decision of the lower court held that the state has not pre-empted to itself the right to license and regulate the defendants it is in error and should be reversed and remanded with instructions to the court to enter judgment denying to the plaintiff any right to license or charge a license fee or regulate the defendants for any purpose whatsoever.

Respectfully submitted.

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