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THE MANDAMUS DENIED.

Compelling The City Council to Issue a Liquor License

TO E. J. PERRY AND COMPANY.

The Opinion in Full as delivered by Chief Justice Zane.

Last evening's issue of the NEWS contained a synopsis of the decision of the Supreme Court of the Territory on a writ of mandamus compelling the City Council to issue a liquor license to E. J. Perry & Company, delivered by Chief Justice Zane yesterday afternoon. The opinion is given below in full.

E. J. Perry, plaintiff, vs. Salt Lake City, defendant.

Zane, C. J.—This is an application by the plaintiff for a peremptory writ of mandamus to compel the Council of Salt Lake City to grant him a license to retail intoxicating liquors. In a verified petition he shows a compliance in all respects with the express requirements of the statutes and the ordinances in making his application for the license.

To the alternative writ the defendant makes its return, verified by Geo. M. Scott, its mayor, and signed by Samuel A. Merritt, its attorney and Charles S. Varian, associate counsel. On the return the defendant states the following facts and relies upon them as a sufficient reason for not granting the license: That the city had issued a theatre license to Charles F. Reynolds & Co. with the express understanding that no intoxicating liquors should be retailed in the building, and that the plaintiff as is believed in collusion with that company is endeavoring to obtain the license to sell liquor in a room in the basement; that the building is situated on Franklin Avenue, a narrow street; that the street and the block through which it extends, is occupied almost exclusively by residences; that about twenty rods from the theatre are a public school and a house for religious worship, and fifteen or twenty rods from them is another church; that there is one saloon in the avenue opposite the theatre believed to be

SUFFICIENT TO SUPPLY ALL REASONABLE DEMANDS

among the various classes and the number of the various saloons and are attended almost exclusively by males; that the plaintiff, without license and contrary to law, sold liquor in the room on two days after the first refusal to issue the license and that on the night of the 14th inst. a ring fight was permitted in the theatre.

In conclusion the defendant claims that it acted within its discretion in refusing to grant the license and that the conduct of its members in doing so was a desire to preserve public order and the morals and happiness of the people of the neighborhood.

In view of the foregoing facts, ought the court to grant the peremptory mandate?

If the refusal to grant the license was not within the discretion of the council the writ should issue; but if it was, then it ought not.

The power of the city Council with respect to the subject is found in volume 1 Compiled laws of Utah, 1888.

Section 176 is as follows: "The city Council shall have the following powers: 4th—To license, regulate and tax the manufacturing, selling, giving away or disposing of in any manner any intoxicating liquors." The section also provides that the term of the license shall not extend beyond the municipal year in which it is issued, and it is subject to the restrictions of the general laws of the Territory, and a bond is required, and the sale to minors, idiots, habitual drunkards or persons intoxicated, is prohibited. Section 461, volume 2, same compilation, forbids the selling or furnishing of intoxicating liquors to any person in the auditorium or lobbies of any theatre, etc.

THE POWER TO LICENSE, REGULATE AND TAX

the sale or disposition of intoxicating liquors within its limits is possessed by Salt Lake City except so far as it is regulated by the above provisions. The Council of Salt Lake City under the power to license, regulate and tax, has by ordinance required a petition by the applicant to be presented to which the place of business and some other minor facts are required to be stated, also a bond in the sum of $1,000, with sureties and provisions are provided. The license is required to be limited to three months and for a retail business $250 is charged. The sale without license, and the sale to Indians, insane or idiotic persons or to minors, and the sale on Sunday is forbidden and punished. And it is also provided that the mayor may, by proclamation, forbid the sale or disposition of such liquors on election days and legal holidays.

The question now comes, has the Council any further discretion with respect to granting such licenses? Under its power to regulate has it any discretion as to the person to whom license shall be granted, as to the place of business, or as to the number of licenses to be granted?

The legislature could have prohibited the traffic, but it did not do so.

However, it did give the City Council the power to license, regulate and tax it. The power is conferred on a deliberative body. And its authority with respect to the subject is not limited to mere ministerial duties. The power of the legislature was unlimited with respect to the business, and all of it except the power to prohibit, subject to a few restrictions named, was conferred by the charter upon the local legislature. And the will of such a body is expressed by a vote and with the right to vote upon any question is implied the discretion to vote for or against.

THE BUSINESS OF RETAILING LIQUORS

may be regulated in various ways. To regulate is to control, restrict and direct. To regulate the liquor traffic according to the purpose for which the power was granted would be to govern it that it will be attended with good order and so far as may be consistent with the happiness and welfare of the people in the community in which it is conducted.

In Chicago, Page, etc., vs. City of Chicago, 86 Ill. 221, the court said: "We are clearly of the opinion that the power to acquire a license is one of the means of regulating the exercise or pursuit of this business. There is, no doubt, a great variety of other means that might be adopted to accomplish the purpose, but these municipalities are not restricted as to the means they employ to regulate the business. In the various illustrations of the meaning of the word regulate, we find among others: To direct, to rule, to govern, to conduct. As the language is used in reference to the power of a city or village government, we suppose it was intended to mean that such bodies might rule or govern the character of business."

The general rule is, that public corporations and officials are required to do what they are authorized to do, when such performance would be beneficial to an individual or to the public. Upon the subject of

OPERATIVE AND DISCRETIONARY POWERS

Judge Dillon says: "It is often material to determine whether a duty imposed by law or charter upon municipal corporations or public officers is imperative or discretionary. This is always a question of legislative intention and therefore of construction. The general test to ascertain this intention propounded in the cases are of doubtful value. * * * Each case, we repeat, must be largely decided on its own circumstances and the legislative intent gathered from the whole act. No positive, infallible or stereotyped rule can be laid down. (First Dillon's Municipal Corporations, sec. 100, 4th Ed.)

It is apparent from the act under consideration that the intention of the legislature in conferring on the Council the power to regulate the sale of liquor was to enable that body to protect society from the evils attending it. The benefit of the dealer was not the chief end. Therefore the duty of the Council with respect to him must depend largely on the good of the neighborhood. If follows that it is the duty as well as the right of the Council, to use all reasonable means to give such protection as the public welfare demands. We are of the opinion that the Council in the regulation of the business has a wide discretion, but it is not arbitrary discretion. Under the power to regulate, the business may not be prohibited. The authority is delegated to the municipal officers as reasonable men and with the expectation that they will employ reasonable means.

To entrust the privilege of selling or interlicensing liquors to persons whose antecedents, habits and characters are such as to inspire confidence in them and warrant the belief that they would not violate the law by selling to minors, habitual drunkards or intoxicated persons and would be likely to conduct their business in other respects with

HOW REGARD TO GOOD ORDER

and the peace and happiness of society would appear to be within that discretion lodged in the right to regulate. The exercise of a reasonable discretion as to the localities in which the business shall be carried on would appear to be within the power to regulate. A saloon along side of a schoolhouse or a church would be very undesirable. And to establish one along side of a man's home would be regarded as very objectionable. To authorize the retailing of liquors in the midst of the homes of the people would be palpably wrong. Neighborhoods infected with liquor saloons are not suitable companies for boys and girls to grow up in. And so a limitation of the number of places for retailing interlicensing liquors in a city would be a reasonable regulation. Because the council may be authorized to license liquor sellers, it does not follow that they must license all who may apply. The powers delegated to the legislative department of municipal governments are usually exercised by ordinance. The council grants the license by a vote; in that way the power is expressed. When the application is made it would appear to be

A SUITABLE TIME TO INQUIRE

and decide as to whether the applicant is a suitable man to be entrusted with the business. And as to the determination of the place and as to whether more licenses should be granted, general tests might be established by ordinance by which to determine the fitness of persons to be entrusted with the business or selling liquor and ordinances be adopted designating localities in which the business may be conducted and limiting the number. But we are not prepared to say that the business may not be regulated in such respects, without ordinance. The charter confers the power to regulate the traffic upon the city without expressly requiring it to be exercised by ordinance. But it is said that the councilmen may act from whims, caprice, partiality or prejudice unless the regulation is by ordinance. The court should assume that public officers will act from proper motives until the contrary appears. It is also claimed that the court must presume that the council acted arbitrarily or without sufficient reasons appearing upon its record. The court will not presume that the council refused the license

ARBITRARILY AND WITHOUT REASON

without some proof. Being public officers and acting under the sanction of an oath, the court will assume that they acted lawfully until the contrary appears.

We have been referred to a decision of the Supreme Court of the United States in reviewing the validity of an ordinance of the city of San Francisco in which this language is found: "The sale of such liquors in this way has therefore been at all times, for the records of every State, considered as the proper subject of legislative regulation. Not only may a license be granted from the keeper of the saloon before a glass of his liquors can be dispensed of, but conditions may be imposed as to the character of persons to whom, and the hours of the day, and the days of the week on which the sales may be opened. Their sale is that form may be absolutely prohibited. It is a question of public expediency and public morality. There is no inherent right in a citizen thus selling liquors to retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community it may, or it may not, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The moment and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, to issue licenses for that purpose."—Lawyer's Co-operative Publishing Company, December, 1890, p. 10-75.

The case of State ex rel. Biger vs. Holt Co. 39 Mo. 521, was an application for a writ of mandamus to compel the county court to issue a license. The statute provided that if the court shall be of the opinion that the applicant is a person of good character,

THE COURT MAY GRANT A LICENSE FOR SIX MONTHS.

This fact was admitted. The application was made in conformity with the requirements in all respects of the statute governing licenses. And the county court refused to grant the license, the court holding that although a party applying for a dram shop license may show himself to possess all the qualifications requisite for the issuing of a license under the statute, the county court may still, in the exercise of its discretion, refuse to grant such license.

Miles vs. Commissioners, 39 N. C. 172, application for mandamus.

The statute involved in the case provided that the applicant might obtain a license from the county commissioners to retail liquor upon proving a good moral character. The court held that such commissioners were not bound to license an applicant, though he be qualified by proof of good moral character; that they had a limited legal discretion and in passing upon an application they have a right to take into consideration the question whether the demands of the public require an issuance of such recommendations and whether the place proposed to establish a barroom at would be a suitable one. The decisive effect is Attorney-General, etc., vs. the

Justices of Guilford County, 5 Id. 3 5.

Petition of Wallace G. Bodenhamer, 120 Pa. St., 326;

Schlabdecker vs. Marshall et al., 72 Id., 200;

Toole's appeal, 90 Id., 370;

The statutes providing for licenses construed in these cases differ in some respects from the Utah statute; but

THE PRINCIPLES LAID DOWN IN THEM ARE REGULAR AND PERFECT

in the North Carolina cases. Parker vs. Portland, 54 Michigan, 208, was a petition for mandamus to compel the board of trustees of the village of Portland to approve a liquor bond. The power to regulate the business had not been granted by the legislature to the board of trustees of the village to determine the sufficiency of the bond; the discretion only extended to that duty. The court held that a mandamus to compel a village board to approve a liquor bond will be denied if there is nothing to show that the refusal to approve it was capricious or to rebut the presumption that the board had fairly passed upon all the questions which determine the sufficiency of the bond and the reliability of the sureties. Patten vs. Village of Homer, 59, Michigan 8, and Empire City of Kalamazoo are also mandamus cases, involving a

[illegible]

case in Fuller vs. Village of Homer, the court held that the village council in approving the bond had the same discretion, and no more than is possessed by other persons called on to approve sureties. We do not regard the Michigan cases as analogous to the one at hand.

The plaintiff also relies upon Zanone vs. Mound City, 105 Ills., 552. The court held that the village council under its power to regulate the liquor traffic might refuse to license persons of such habits and character as rendered them unfit to be licensed, and to limit the number of dramshop keepers, but held that the discretion should be exercised by ordinance in order to avoid favoritism and monopoly.

From this opinion three of the seven judges dissented.

After a careful consideration of the statutes, the ordinances and the cases cited, we hold that

THE DEFENDANT POSSESSES THE POWER

to license, regulate and tax the liquor business, and that in the use of such authority it may exercise a reasonable discretion in determining who are suitable persons to entrust the business to the places where it may be conducted, and the number of licenses it will issue. And that the Council may exercise that discretion when the application is made when it has not done so by ordinance before. And that the court will not assume that the Council acted arbitrarily or from any improper motives without some evidence to that effect.

The writ of mandamus is denied.

Concurred in by Blackburn, J.; Axtell, J.

Miner, J., reserves the right to hand down separate opinion.

READY REFERENCES.

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