

1949

# John C. Davis v. Ogden City, Utah, and Clyde M. Weber : Brief of Plaintiff

Utah Supreme Court

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Debra B. Van Dyke; Stewart P. Dobbs; Ira A. Huggins; Llewellyn O. Thomas; Attorneys for Plaintiff;

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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JOHN C. DAVIS, Attorney at Law,  
for himself and all other duly  
licensed and active practicing at-  
torneys and counselors at law, simi-  
larly situated, within the State of  
Utah,

*Plaintiff,*

vs.

OGDEN CITY, UTAH, a Municipal  
Corporation, and CLYDE M. WEB-  
BER, Ogden City Recorder,

*Defendants.*

FILED

MAR 3 1949

CLERK, SUPREME COURT, UTAH

BRIEF OF PLAINTIFF

---

DERRAH B. VAN DYKE,  
STEWART P. DOBBS,  
IRA A. HUGGINS,  
LLEWELLYN O. THOMAS,

*Attorneys for Plaintiff*

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7241

CASE NO. 7241

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*Attorneys for Plaintiff*

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Case  
No. 7241

BRIEF OF PLAINTIFF

---

STATEMENT OF FACTS

Ogden City, a municipal corporation, through its Board of Commissioners, on April 15th last adopted an ordinance, herein complained of, which was published, and by its terms became effective April 17th, 1948. The ordinance purports to levy a tax upon those practicing

law in that city, as well as upon many other occupations. The plaintiff is an attorney at law, who has been duly licensed to practice as such and who has complied with all the prerequisites imposed by the laws of Utah upon those who wish to practice that profession.

The action is brought both for himself and on behalf of all others similarly situated, to obtain the peremptory writ of this Court restraining the City of Ogden from enforcing its ordinance so far as the same has application to plaintiff and such other lawyers as are affected thereby. The alternative writ of this Court issued, service thereof has been accepted by the attorney for Ogden City, and the matters are heard upon the demurrer of the City, and its co-defendant, the City Recorder.

The petition of Mr. Davis sets forth that Ogden City has numerous courts, including a division of the United States District Court, there sitting, numerous public offices to which lawyers must resort, numerous businesses having dealings in many points without Ogden City and Weber County, its location, and that many lawyers without that City, as well as those maintaining offices therein, are interested in the matter before the Court. It recites that shortly prior to the filing of the proceeding in this Court the City, through its police department, served notices upon him and other lawyers, requiring appearances and payment of the tax imposed by the ordinance within five days from date of that service. The ordinance is contended to be invalid, as

to members of the bar, upon several grounds which will be developed in the orderly arrangement of this brief.

## ARGUMENT

The authority of Ogden City, which is not a chartered City, to levy any occupation tax must be derived from some express statutory enactment of the Legislature. The Statutes of this State which have application to the questions here raised are Sections 15-8-39 and 15-8-80, Utah Code Annotated 1943. Of these, the first is a grant of power to license, tax and regulate certain specific occupations and businesses, the practice of the learned professions being in no instance included. This then has application solely as disclosing the limits of the regulatory power of Cities, and as establishing that Ogden City has no power to regulate the practice of law.

Section 15-8-80, so far as here pertinent, confers authority, so far as the Legislature has constitutional power to do so, upon cities to "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," such power not being limited by any specific enumeration of powers contained in any other portions of Chapter 8 of Title 15, Utah Code Annotated, 1943, but with the requirement that such taxes shall be uniform in respect to the class upon which they are imposed.

The ordinance in question, so far as pertinent to this proceeding, contains the following provisions:

It makes it unlawful to engage in "business" within the corporate limits of Ogden City without first obtaining the business license provided for in the ordinance, to violate any other provision of or to fail to comply with "all of the appropriate provisions" of the ordinance, and makes any such failure a misdemeanor. (Section 1).

Business, as defined by the ordinance, includes all activities engaged in or caused to be engaged in for gain or economic profit, except the service of employees to employers, and is further defined as including both the sale of tangible property, and "the rendering of personal services for others for a consideration by any persons engaged in any profession, trade, craft, business, occupation or other calling." (Section 20, (a) and (b).) .

The City Commissioners are given authority to revoke any license granted under the ordinance for violation of any of its provisions by the licensee, "and for such other cause as is justified in law". There is nothing further in the ordinance which throws any light on the quoted language. (Section 17).

The ordinance bases the license fee upon a sliding scale, graduated in accordance with "gross receipts" which are defined as covering all receipts from any business subject to the ordinance transacted in the city, except certain excluded items such as sales tax collected, receipts from sales or services rendered the United States, and certain federal taxes collected in connection with sales. (Sections 6, 10 and 19 (c)).

Provisions looking towards enforcement include the requirement that the license be conspicuously displayed at all places of business licensed, (Section 12), the requirement of keeping of books and records accurately reflecting gross income and preserving same for four years (Section 14), penalties of 10% plus 1% per month interest on delinquencies (Section 15), prohibiting false returns, (Section 16), power conferred upon the City Recorder where application is not filed and fee paid to determine amount of fees due, plus penalties and interest, and to enable him to so determine the amount due he is given access to books, records, inventories, invoices and stocks of goods of the licensee, but he may fix the sum arbitrarily, since he is not required to exercise such power of search, (Section 18).

Finally in addition to the criminal remedy of prosecution, the right to bring civil suit to recover any sums due is extended, (Sections 1 and 19).

## STATEMENT OF GROUNDS OF COMPLAINT

The ordinance in question is attacked by the petition upon the grounds that;—

No. 1: The practice of the law is not a business within the scope of Sections 15-8-39 or 15-8-80, Utah Code Annotated 1943; and

No. 2: That lawyers, as a class, being licensed and regulated by the State, are not subject to "license and regulation" by municipalities; and

No. 3: That the ordinance is discriminatory in that it taxes gross earnings (with some deductions which it sets out) of those engaged in a profession or calling and employed by the public generally, without taxing others, including those of the same profession or calling, who receive their remuneration from one or more persons in the form of salary, rather than of fees; and

No. 4: That the ordinance, being in the nature of one imposing a gross income tax, is in excess of the powers delegated to municipalities; and

No. 5: That lawyers, as a class, being a part of the judicial branch of the government, are not subject to either licensing or regulation by municipalities; and

No. 6: That the ordinance impairs the rights of litigants to be represented by legal counsel of their own choice.

## PROPOSITION NO. 1

The question is presented, does any statute authorize imposition by a municipality of either a license or an occupation tax upon members of the Bar?

There is no contrariness of opinion on the question of the right of legislatures to grant to municipalities the right to regulate the practice of the learned professions. It is held generally that regulation is the outgrowth of the police power, that it lies in the field where public health, safety or morals justifies interference by the public by way of regulation of business to prevent

damage to either, and the practice of law is not such a business. That the Courts, and in the absence of their assumption of control over the field, the Legislature, may adopt or pass regulatory rules or laws for the Government of the Bar, admission thereto and ejection therefrom, as a condition of permitting its practice, is conceded; but this does not bring the practice of law within the scope of the police power. That regulation sounds fundamentally, as we shall see later, in the power of Courts over those who are its officers and in the imposition of conditions for such discipline upon those to whom the restricted privilege of the practice of law is granted. We submit that the books are entirely without example of any case where the regulation of legal practice by any legislative body, other than a State Legislature, can be found. For examples of cases which discuss the necessity of the police power existing to sustain regulation of businesses by municipalities, see:

City of Sonora vs. Curtin, (Cal.) 70 Pac. 674.  
Hill et al vs. City of Eureka (Cal.) 94 Pac.  
2nd 1025.

In re Quong Woo, 13 Fed. 229.

It is said in the case of the City of Sonora vs. Curtin (*supra*) on pages 675 and 676, where the question of the power of the City to regulate the bar was directly involved:

“There is nothing about the practice of the profession of the law which makes the business dangerous to the public. It does not threaten

the public health or safety, nor is it demoralizing to the public. — This ordinance could not have been passed under the power to regulate, for it is evident that the board of trustees have no power to regulate the practice of the law. They have no power to pass upon or inquire into the qualifications or character of persons who desire to practice law, nor to say where or in what courts they shall practice.”

As we have pointed out, Section 15-8-39, Utah Code Annotated, 1943, giving power to “license, tax and regulate” certain specified occupations does not include the learned professions and, we may add, none of the many sections granting powers over other businesses and occupations, which may be found in Title 15, Chapter 8 of the Code of Utah make any reference to the professions. If that power exists, it must be found under Section 15-8-80 of said Code. We contend that it does not there exist for two reasons:

(A). The legislative history of the act discloses intent of the legislature not to place the practice of the law within the scope of occupation taxes;

(B). The wording of the statute itself does not extend to authorize the levying of occupation taxes upon businesses within the regulatory power.

*As to (A)*—We think this Court has determined the right of taxation of members of the Bar many years ago and the legislative situation which it then outlined has not been altered since the opinion in that case was handed down. The case we refer to is *Ogden City vs.*

Boreman, 20 Utah 98, 57 Pac. 843. In that case, Ogden City sought to tax by the licensing method those engaged in professions in that City, including the defendant, who was a lawyer. The decision was against the City and was based upon two grounds, being:

(1) That a general statute, similar to Section 15-8-80, as it stood prior to the amendment by the 1935 Legislature, did not extend the power of the City to license, for revenue purposes as there attempted, any business or occupation not enumerated in some specific statute, such as Section 15-8-39.

(2) That the legislative history of licensing provisions disclosed the intent of the Legislature to withhold the power to license the legal profession from Utah municipalities.

We shall not argue here the first of the matters decided in that case, since the 1935 Legislature added a proviso to Section 15-8-80 which expressly states that "no enumeration of powers" contained elsewhere in the chapter defining the powers of cities "shall be deemed to limit or restrict the general grant of authority hereby conferred." But we do contend that the other point upon which the Boreman case was decided remains applicable to the ordinance in question, and that the legislative history there cited still remains applicable to the matter now before this Court.

It will be remembered that, as set out in the Boreman decision, Utah had an express statute re-enacted

in the compilation of the 1888 laws, authorizing cities to impose license taxes upon lawyers. The same laws contained statutes which, with little change, remain as Section 15-8-39 and as Section 15-8-80 (with the 1935 proviso eliminated) of our present Code. In 1898, when the revised statutes for that year were enacted, the express grant of authority to tax lawyers was repealed, the other statutes remaining. This Court said on pages 844 and 845, in said Boreman case (Pacific citation):

“A general rule for the construction of statutes is that where a part of an act has been repealed, it must, though of no operative force, still be taken in construing the rest. — By repealing the clause providing for licensing and taxing lawyers, and enacting the general clause referred to, leaving lawyers, and the professions generally out of such re-enactment, impels the conclusion that the legislature intended to deprive the cities of the power to impose a license fee or tax upon lawyers that they had formerly possessed.”

It is to be noted that the only change in the language of that part of Section 15-8-80, which precedes the proviso, made since its original enactment, is the dropping from it of the words “any private corporation or” which, in the original text preceded the word “business”. The scope of that part of the statute has been narrowed, if anything, rather than widened. The proviso shows legislative intent to destroy the objection to license taxes made in the first arm of the Boreman decision, that is limitation of the general statute to

matters covered by specific statute, but the argument made in the second arm of the opinion remains valid. For it would seem to be clearly the law that, in such a legislative situation, an implication of intent to include the legal profession in the scope of the licensing power will not be indulged in; — express language is necessary, and there is in this statute no such express grant of power to overcome the effect of the law of this State as it existed in 1935. In *American Co. v. City of Lakeport*, (Cal.) 32 Pac. 2nd 622 it is said on page 629.

“But the imposition of a tax by inference or implication, no matter how logical or reasonable it may seem, is universally condemned by the authorities which lay down the rule that the tax must be based upon express statutory authority, and that doubts will be resolved against the taxing power.”

See also :

Cache County vs. Jensen, 21 Utah 207 ; 61 Pac. 303.

Salt Lake City vs. Revene, 101 Utah 504 ; 124 Pac. 2nd 537.

Lent vs. City of Portland, (Ore.) 71 Pac. 645.

Barnard and Miller vs. Chicago, (Ill.) 147 N.E. 384 ; 38 A. L. R. 1533.

To cite more cases would be a work of supererogation. There is nothing in decided authority to the contrary. The rule is fundamental.

*As to (B)*, — Section 15-8-80, interpreted as prior decisions of this Court require, applies only to such

businesses as are within the regulatory power and as to which the taxing ordinance contains some effective measure of regulation. The practice of the law, being entirely without the scope of municipal regulation, is beyond the power of the City to tax.

Our argument is based solely upon the decisions of this Court. We are aware that in such sister states as California and New Mexico, the latter applying California rules, decisions to the contrary appear. Nor have we failed to consider that in such cases as *Salt Lake City vs. Christensen Co.*, 34 Utah 38, 95 Pac. 523, 17 L. R. A. (NS) 898, this Court has reached a result which is contrary to the contention here made — but in such cases the point we raised has not been discussed. Section 15-8-80 contains as its component parts a power granted, a means prescribed, a limit on its extent. The power is to “raise revenue — and regulate” the means prescribed, are “by levying and collecting a license fee or tax” and the limitation is “on any business within the limits of the City.” Section 511, Subd. 11, Revised Statutes of Utah, 1898, a predecessor statute to Sections 19-5-27, Utah Code Annotated, 1943, granted to counties the power “to license, for purposes of regulation and revenue, all and every kind of business, not prohibited by law, transacted and carried on in such county,” then adding words limiting the power to tax shows, exhibitions, etc., to those carried on without incorporated cities. Here again we have a power granted, a means prescribed and a limit on its extent. The power

granted again is to raise revenue and regulate, the means prescribed is that of a license fee or tax and the limitation is to business "carried on in said county" except as noted with respect to shows, exhibitions, etc. Gramatically speaking, the two statutes, while having a somewhat different arrangement, express identical powers having substantially the same limitations and are to be carried on by identical means. We submit that the interpretation placed on the statute respecting counties applies with full force and effect to the statute here considered, respecting cities. For that reason the case of Cache County vs. Jensen (*supra*) seems to us decisive on that point. In that case Cache County under the statute granting license powers to counties above-referred to, passed an ordinance applicable to "the business of raising, grazing, herding, or pasturing of sheep" within that County, fixing license fees on a graduated scale based upon the number of sheep owned or in possession, making failure to obtain a license to be a misdemeanor, providing for an official person whose duty it was to collect the tax, and providing for prosecution of actions arising therefrom. The Court said, among other things:

"So a right to license a business or occupation does not imply a right to exact a tax merely for revenue, and where the object is revenue, the power to license must be conferred in unmistakable terms. Cooley Const. Lim. 242". (*Ibid*, p. 305.)

"... A municipal corporation, as such, has no inherent power to grant licenses or exact

license fees; it must derive all of its authority in this regard from the state, and the power must be taken by direct grant, and cannot be taken by implication". (*Ibid*, p. 306)

And held that the powers granted by the ordinance referred to extended only to the raising revenue from businesses which, under it, the County might regulate, saying:

"If the legislature had intended to delegate to such boards, through the medium of a license, the power to raise revenue without reference to regulation, it was within its power to do so in unmistakable terms. Any doubt or ambiguity arising out of the language must be resolved in favor of the public. The power must be the result of a direct grant, and cannot be implied. Such a statute must be construed with much strictness". (*Ibid*, p. 306).

The converse of the argument made in the case of Cache County vs. Jensen arose in the case of Ogden City vs. Leo, 54 Utah 556, 182 Pac. 530, 5 A. L. R. 960, in which, under a statute authorizing cities to "license, tax and regulate" certain businesses, including eating houses, it was contended that the powers granted did not extend to regulation beyond that necessary to implement the levy of a occupation tax and so did not authorize the City to prohibit installation of booths in public eating and drinking places. This Court held that the statute was not subject to such construction, full force being required to be given to the word "regulate" so used.

Our contention then is that, construed as this Court construed the statutes provided in the two cases last above-cited, Section 15-8-80 confers a power to raise revenue and regulate, and that where there may be no regulation there may not be power to raise revenue, so that in effect the statute extends the express powers of regulation by taxing for such purpose to business and occupations within the City which may lie within the purview of the police powers, and which are not elsewhere expressly mentioned, and authorizes such taxation to go beyond the limits which a regulation tax alone would permit, and to invade the field where taxation for revenue lies.

The practice of law, as we have seen, does not lie within the regulatory field of cities, nor is it subject to any such regulation, the State having pre-empted by its legislation all rights of that character over that profession. It therefore lies without the scope of Section 15-8-80. So construed, the statute is valid. Construed as permitting cities to raise revenue and regulate the practice of law by means of license fees or taxes, the statute would be wanting in constitutionality, because the right to license, as distinguished from the right to tax, the carrying on of the practice of law, without regard to the qualifications of those so taxed, is beyond the power of the legislative arm. We might add that, while California cases uniformly hold that statutes giving the power to raise revenue and regulate are to be read as if the "and" was "and/or", in at

least one case that Court, while adhering to the rule, did so on grounds resembling that which justifies application of the rule of stare decisis — that is, that it was settled law, although probably not good law. See *Ex Parte Nowak* (Cal.) 195 Pac. 402.

## **PROPOSITION NO. 2**

Under this heading there is raised the question as to whether the practice of law is subject to taxation for revenue, without any attempt at regulation. In the case of *Ruckenbrod vs. Mullins*, 102 Utah 548; 133 Pac. 2nd 325; 144 A. L. R. 839, this Court has pointed out that the authorities are in conflict respecting this matter. In Sub-section (A) under Proposition No. 1 of this brief we have pointed out that Section 15-8-80, Utah Code Annotated 1943 applies only to such businesses as are within the regulatory power and that the practice of law does not come within the scope of such municipal regulation. We respectfully submit that the argument under that point is applicable to Proposition No. 2.

## **PROPOSITION NO. 3**

Under this heading we argue that the said Ogden City ordinances as drawn, whatever may be its statutory warrant, is invalid because it is discriminatory, not only because it taxes gross earnings of those engaged in the professions and other callings, excluding others who are also earners of incomes, but that it discriminates among members of the various branches of the

professions and callings by taxing those who serve the public as a whole but excluding those whose service is limited to those only who pay their fixed and stated salaries.

It will be noted that the tax or license fee is based upon income, notwithstanding the city refers to income as gross receipts, so that the classification fixed for the purpose of taxing or licensing is based upon persons with an income rather than upon the nature or kind of business, trade or occupation engaged in. As further evidence that the tax or license is based upon income is made apparent in Section 13, which follows the state and federal income tax laws, making the information required upon the return blanks exempt from public inspection, etc.; Section 14, which requires the keeping of books and records for a period of four years; and Section 18, which again follows the state and federal enactments, permitting the city to determine the amount of income of one who fails or neglects to file his return and fix the tax or license due thereon; also gives the city the right to examine books and records of the subject to determine the correctness of his report and return.

After having classified the persons subject to the payment of the tax or license fee, based upon income, the ordinance makes certain exceptions therefrom. The general classification fixed is found in Section 20, as follows:

“A. Business as used in this ordinance shall include all activities engaged in or caused to be engaged in with the object of gain or economic profit,”

which classification, of course, to that point includes all persons with an income from any source whatsoever. Having made the general classification upon which the tax or license is based, the city seeks to make an exception therefrom as follows:

“but shall not include the acts of employees rendering service to employers.”

In Sub-division B of the same section the act further defines the words “engaging in business” and therein includes “the rendering of personal services for others for a consideration by persons engaged in any profession, trade, craft, business, *occupation or other calling.*” (Italics added.)

The act must be considered from the standpoint of the inclusion of persons employed for a consideration in any profession, trade, craft, business, occupation or other calling as against the exclusion of “the acts of employees rendering service to employers” and as against the general inclusion of all income earners as against the exclusion of “the acts of employees rendering service to employers.” We shall not make the contention that the city or the taxing power may not classify certain of its inhabitants upon which a tax or license fee may be imposed and that it may not exclude other groups from the payment of that tax or license

fee. The contention is that the segregation or classification of different groups or segments of the population for taxing or license must not be arbitrary but must be based upon reason to satisfy the provisions of the federal constitution, which provides that

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.”

Amendment XIV, Sec. 1, Constitution of United States.

Article 1, Sec. 24, Constitution of Utah.

That the provisions of the federal and state constitutions are equally applicable to the legislative enactments of cities as well as the state is so elementary that we think the citation of authorities is not necessary.

It is the contention of the plaintiff that the inclusion of all income earning groups except “employees rendering service to employers” in Section A of Section 20 is arbitrary and discriminatory against and abridges the privileges or immunities of citizens of the United States residing within Ogden who are subject to the tax and denies unto them the equal protection of the laws. The exclusions or exceptions from the provisions of the act, of wage earners are, using the language of the act, “the acts of employees rendering service to employers” to be a valid exclusion or exception, as previously stated, must be based upon reason and must not be arbitrary

or discriminatory. What, if any, could the reason be? It could not be based upon amount of income, because it goes without saying that the fellow who runs a boot-black shop and numerous other small businesses may very well have a substantially less income than many employees, particularly school teachers and executives of corporations, who in many instances are among the highest income groups. It cannot be based on the necessity to regulate for the reason that many persons, and particularly the professional groups, are not subjects of any special or extra regulation by the municipal government, to which wage earners and salaried groups are not also subject. As a matter of fact, the store-keeper, such as the clothier, the furniture dealer, the groceryman, the lawyer, the doctor or dentist, are all engaged in legitimate business beneficial to the public and community generally. All professional groups are regulated by the state through the Department of Registration and state courts, whereas the employee of the employer who is running a gambling game or illicitly selling liquor or drugs or a booking agent for a gambling house and many others who are engaged in immoral and illegal practices and subjects of the need for great regulation and of great cause for concern to the municipality and the public generally, are completely exempt from the provisions of the act. It cannot be on grounds of protection for the reason that the school-teacher, who is exempt in the act, has the protection of the school building and classroom in which he teaches. The tools of his profession or trade are pro-

vided for him. He has police, fire and health protection the same as the lawyer, the doctor or the storekeeper. Hence, the only basis upon which the classification could have been made is based upon the fact that the wage earner or salaried person constitutes the majority of our residents and hence casts more votes on election day.

It might also be noted that the doctor, the lawyer, the dentist and other so-called professional men actually earn their income through performing services for others. They are employees in a sense as is the manager, the janitor or other employee of a business. The professional man is a specialist in his line. Most employees are specialists in their line. A salesman is hired because he is adept and trained in the selling of goods. He is a specialist in the same sense that the doctor or lawyer or dentist would be a specialist. The average employee receives the same protection as does the average doctor, lawyer or other professional man in that the place in which he is employed is protected; his health and welfare are protected; his place of employment is protected by the police, fire, street and health departments of the municipality. There is no true difference in the fundamental purpose of an occupation, between a man employed to sell automobiles and an attorney employed to protect the rights of an individual in a court of law. The attorney has been and is held to a greater degree of required proficiency by regulation of the state. However, the fact that he is licensed by the state and is required to adhere to certain rules and regulations of the state does not change the fact in any

way that the attorney does receive his compensation in the same manner as a salesman or any employee receives compensation and of course for the same purpose "gain or profit". We find many lawyers who are employed on a salary basis by various companies and by the municipal, state and federal governments. Such salary would be exempt under the ordinance. We recognize the fact that these attorneys are given the same protection. They have their offices in which to work and perform services for their employer, and these offices are oftentimes not in a building owned or leased or rented by the employer but are offices maintained by the attorney. He is furnished the same protection as are the attorneys who are not regularly employed by the corporations or governmental departments. There is actually no difference between an attorney who works full-time for a corporation or a governmental agency and one who works for a period of time for one corporation, then a period of time for another corporation or employer, be the employer a governmental agency, corporate entity or an individual. Indeed, the payment of retainer fees has always been considered most desirable in the practice of law. The lawyer endeavors to be employed regularly by one or more employers. It is unreasonable and arbitrary to say that because an attorney derives his income from a number of employers that he is in a different class than the attorney who derives his income from one employer. The ordinance in question sets up as a class all people receiving income. Assuming this to be a reasonable classi-

fication, it certainly becomes unreasonable when the large portion of the class as a whole are exempt and excused from the payment of this license tax because they obtain their income in a slightly different manner than those who must pay the tax. We have already pointed out that even their manner of earning their income is actually no different than the manner in which the professional man obtains his income. We are all employed to do a certain job. The professional man is known as a professional man, principally because he is highly regulated and held to a high degree of proficiency by the state. That State regulation and that requirement of high proficiency resulting therefrom are certainly no basis for discriminating against the professional man.

We can cite hundreds of cases, commentaries and textbooks on the basic rule that, in order to tax a class, the classification must be reasonable and not a mere arbitrary distinction, in order that the above referred to equal protection and privileges and immunities clauses of the federal and state constitutions be complied with.

In *State v. Wright and others*, (Ore.) 100 Pac. 296, the Supreme Court of Oregon stated the following on page 298:

“It is true a state may impose a tax on or require a license from persons engaged in certain callings or trades without being bound to include all persons or all property that may be legitimately taxed for governmental purposes. But the classification must be on some reason-

able basis, and the law, when enacted, must apply alike to all engaged in the business or occupation. \*\*\* A statute which directly or by implication grants special privileges, or imposes special burdens upon persons engaged in substantially the same business under the same conditions, cannot be sound, because it is class legislation and an infringement of the equal rights guaranteed to all."

In the case above mentioned salesmen of certain articles were taxed, and salesmen of other articles were exempt from the tax. None of the articles were injurious or detrimental in any way. The class involved in that case was all salesmen. The class involved in the case at bar, as set out by the ordinance, is all income earners. The exemptions given in our case were arbitrary in view of the fact that there is no essential difference between the compensation earned by a so called employee of employers and the compensation earned by an attorney, who is in essence employed by a number of employers.

The city ordinance has set out their classification and have set out exemptions within this classification. These exemptions are discriminatory and based on an unsound conception of how attorney or other professional man obtains his income.

This Honorable Court in *State v. Bayer*, 34 Utah, 257; 97 Pac. 129, found that it was unreasonable to require a license for peddling of certain articles and exempting peddlers of other articles from any license tax.

The court made the following statement on pages 131 and 132 of the pacific citation:

“Now it is apparent that under the pretense of exercising the police power or of adopting a revenue measure, the legislature passed the act for the mere benefit of local and domestic dealers. \*\*\*\*\* We are well satisfied that the act has no such relation to the public health or morals as will sustain it as a police measure. Nor can it, because of its illegal discrimination as to property and persons, be upheld as a revenue measure. We think it repugnant to the provisions of the federal constitution that no state shall abridge the privileges or immunities of citizens of the United States nor to deny to persons within its jurisdiction the equal protection of the laws.”

It is obvious that the ordinance in question in the case at bar is not a police measure. Therefore, if it is to be upheld as meeting the requirements of the federal constitution, it must be upheld as a revenue measure.

A case in point is *State v. Parr*, reported in 109 Minn. 147, 123 N. W. 408, 134 Am. St. Rep., 759. In that case a legislative enactment sought to tax the occupation of and to license hawkers, peddlers and transient merchants and then defined the occupations and distinguished between so-called transient merchants and so-called permanent merchants. The Supreme Court of Minnesota, looking through the different groups referred to as hawkers, peddlers and transient merchants, made this significant statement on page 410 of N. W.:

“The basis of classification is residence within a prescribed division of the state, the immediate effect of which is to protect such resident merchants from competition from the outside or to deny them the privilege of entering more promising territory than their own and adjacent counties.”

Since the basis of the classification in that case was residence within the prescribed division in the state the court found that there was a discrimination between members or groups of that general classification, and that the measure violated the state and federal constitution both as a regulatory measure and as a revenue producing measure. The court further said in part on said page 410:

“The legislature is not required to provide for the taxation of occupations; but if such a course is pursued and any occupation is selected for that purpose, then the burden must fall *equally upon the members of the class.*” (Italics supplied).

By classifying upon the basis of income earners instead of occupation, the principle of discrimination remains as effective, and the same result obtains. That principle was succinctly stated by this court in *State v. Wright*, *supra*, in the following language: (page 298)

“But the classification must be on some reasonable basis; and the law, when enacted, must apply alike to all engaged in the business or occupation.”

In *Park City v. Daniels*, 46 Utah 554, 149 Pac. 1094, this court again laid down the rule, page 1095 of pacific reporter :

“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. Citing *Salt Lake City v. Utah Light, etc. Co.*, 142 Pac. 1067. \*\*\*\* The discriminations which are open to objection (lack of uniformity) are those where persons are engaged in the same business are subject to different restrictions or are held entitled to different privileges under the same conditions.”

The *State v. Parr* case, *supra*, applies the same rule where the basis of classification is broadened to include area or locality. It certainly does not require any stretching of the imagination to apply the same rule to the broader classification of income earners.

In *State v. J. B. and R. E. Walker, Inc.*, a very recent case, reported in 116 Pac. (2), 766, this court, speaking through Chief Justice McDonough, said, on page 769, Pac. :

“In order to see whether the excluded classes or transactions are on a different basis than those included, we must look at the purpose of the act. The objects and purposes of the law present the touchstone for determining proper and improper classifications.”

Surely the purpose of this act is revenue, and the subjects to whom the act applies are income earners, be-

cause non-income earners would produce no revenue, and the exclusions or exemptions must be based upon some valid constitutional reason other than voting power or numbers. The group covered by the general classification here and every individual member of the group receives his or her income for some tangible or intangible consideration, whether a service or for sale of goods.

It is, therefore, our contention under the cases cited that this ordinance is arbitrary and discriminatory for the following reasons:

1. That certain segments of the general classification (income earners) are excluded or exempted without any valid reason therefor, because all members of the general classification have the same police, fire and health protection.

2. That there is no legal difference or distinction sufficient to form a legal basis for classification between the income earner who receives all his income from one source or many sources.

3. That there is a discrimination resulting under the ordinance in the income of individual members of the general classification, that is, income based upon a fee basis or salary or wage basis.

4. A discrimination against local residents who practice law as against those residing without the city but maintaining offices therein, which would arise if

the ordinance be held to apply to residents only. We point out in other sections of this brief that we believe the ordinance as drawn applies to all members of the profession, without respect to residence or place where an office is maintained, and there assign our reasons for deeming such a tax improper.

### PROPOSITION NO. 4

That the city is without power to levy gross income taxes upon its residents would seem almost to be accepted without argument. For that matter, we are unable to see that there exists any distinction between the power to levy a tax based upon gross income, as here, and one based upon the income remaining after such exemptions, deductions, and personal credits as the law levying the tax may grant. This ordinance itself makes certain such allowances, and is not a tax on all gross income, although it omits power to deduct from the income taxed most of the items of expense which come from income earned before its productiveness as net income can be measured.

The power to levy any occupation tax and, as noted, only such a tax could under any reasoning be levied upon the practice by a lawyer of his profession, must find its basis in some statutory enactment. The legislature of the State of Utah, while providing a system for state taxation of incomes, has never seen fit to grant such a power to its municipalities.

## PROPOSITION NO. 5

Here we raise a question which seems to have been absent in litigation concerning the imposition of occupation taxes upon members of the Bar. Perhaps this question has not been considered because of the fact that the integration of the State Bar associations and the final taking over by the Courts of the rule-making power and the control of the officers of the Courts including lawyers is of comparative recent development. Want of power of the legislative authority to interfere with the Bar of the State, particularly where the State through an organized Bar, subject to the jurisdiction of the Courts only and acting under the authority of those Courts, controls the profession, has been well presented to this Court in a recent brief in the case of Thatcher et al vs. Industrial Commission et al, now pending before this Court. Because that matter has been argued and is in the bosom of this Court we shall not be so presumptuous as to repeat at length the argument there made, however, we cite the authority, more fully discussed in the brief in that case and summarize the rules of the law therein stated. The argument sounds in the function of the individual lawyer as an officer of the Court, as well as in the fact that, the judicial branch of the Government having taken over jurisdiction over the profession of the practice of law, the legislative branch may not impose conditions of any kind upon the exercise of his functions by the lawyer. That such practice is so intimately bound up with the judicial

power that it may not be interfered with by other branches of the Government is pointed out in:

*In re Platz* 42 Utah 439; 132 Pac. 390.

*In re Unification of Montana Bar Association* (Mont.) 87 Pac. 2nd 172.

*In re Integration of Nebraska State Bar Association* (Neb.) 275 N. W. 265; 114 A. L. R. 151.

*State ex rel Ralston vs. Turner* (Neb.) 4 N. W. 2nd 302; 144 A. L. R. 138.

*In re Fletcher*, 107 Fed. 2nd 666, Cert. den. 302 U. S. 664.

*Meunier vs. Bernich* (La.) 170 So. 567.

See Annotation 144 A. L. R. 150.

We direct attention to those cases which are based on the rule that when the judicial authority has once moved into the field of control of the Bar, and occupied it, the legislative activity in that field, although perhaps paramount before, ceased to function. See *in re Berkwitzk* (Mass.) 80 N. E. 2nd 45.

We also direct attention to the fact that, while, as in the case of *In re Platz* (supra), this Court recognized legislative enactments in aid of this Court's jurisdiction over the Bar up to a recent date, when this Court adopted its rules in 1937, in these rules this Court incorporated statutory provisions so that they might continue in effect and declared that it adopted these rules

under its inherent power to supervise the conduct of members of this Bar.

Whatever might have been the position of this Court prior to the integration of the Bar under its supervision, the Courts and the Courts alone may now say what must be done by a lawyer to enable him to appear in any Court in this State wheresoever situated and wheresoever he may reside or maintain an office. Any legislative infringement in that field, whether by way of license or tax or regulation, has no warrant.

### PROPOSITION NO. 6

Our Petition somewhat ineptly states the point we desire to reach under this division. Our point might be stated more aptly as follows: If such an ordinance as the one in question, which taxes not the maintenance of a place for transacting legal business but the performing of any legal business in a community, is lawful, then the result will be damaging not only to the lawyer but to the public, since it will inevitably result in restrictions upon the field in which a lawyer can afford to practice and so deprive litigants of service by counsel whom they would otherwise employ.

It is the contention of plaintiff that the language of the ordinance makes the requirement of obtaining an Ogden license incumbent upon every member of the legal profession who practices his profession in that city, — and this without regard to the maintenance of

an office therein. We concede that there are elements in this ordinance which look the other way, — such as the requirement of Section 2 that licenses must be procured for each place of business within the City, and the Section following it, which requires separate application for each place of business, and also the requirement of Section 12 in the placing of the license on conspicuous display, “in the place of business licensed.” But the express language of the ordinance can not be varied by such rules, which would be applicable either to an ordinance whose incidence is equally upon maintenance of a place or places of business within the City and upon the transacting of business therein. The broader scope of the ordinance is shown by the fact that the act made unlawful by Section 1 is not the maintenance of a place of business without a license but the engaging in business without a license. Engaging in business is defined in Section 19 (b) as specifically including “the rendering of personal services for others for a consideration by persons engaged in any profession, trade, craft, business occupation or other calling.” Such language includes the small contractor whose office is “under his hat” just as readily as it includes large construction companies with acres of land for storage of equipment. It includes the peddler or canvasser who sells intangible property by sample as well as the department store. A physician who practices his calling in the hospitals and in the homes of his patients may have no place of business where he might display his license but would nevertheless be engaging in his

profession within the City. The lawyer who resides and maintains his office without the corporate limits of Ogden City, possibly in South Ogden or Roy, but who necessarily enters the territory of Ogden City to appear in the Federal Court or the Courts maintained by the State, certainly practices law in Ogden City just as definitely as do counsel for litigants in railroad cases or counsel representing other large corporations or litigants who customarily employ legal counsel without respect to the residence of such legal practitioners.

If such an ordinance can be sustained, then in view of the needs of Utah cities and towns for additional revenue, which need must be a part of the general knowledge of public affairs which this Court may consider, it is no idle speculation to say that cities and towns generally will enact similar ordinances. Under such condition legal counsel from Ogden would be required to obtain license from and pay fees to Salt Lake City for the privilege of appearing lawfully before this Court or the United States District Court sitting in Salt Lake City and for the privilege of examining records or conferring with State Departments or commissions or for the privilege of performing the multitude of other legal duties which representation of clients now imposes upon the legal practitioner.

The lawyer's charges are not ordinarily based upon a time schedule but are predicated upon such other factors as the importance of the matter at hand may dictate and as the results or the time expended may war-

rant and a multiplicity of such ordinances would impose upon the lawyer the impracticable task of assigning to each community where he engages in business the correct proportion of the fee to be paid by that client, — and this with no standards established by which he may so assign the results of his labors and with the constant danger that he may be found to have erred in his computations resulting in his license being rescinded and his right to appear before the Courts in this or that community taken away.

Such results are not speculative nor improbable but are the almost certain results of such taxation of a profession which, because it necessarily may include wide territorial scope, is ordinarily treated by the Courts in such wise that by “professional courtesy” even members of the Bar from without the state are permitted to appear before our Courts in isolated cases without complying with the rules requiring Utah license and Bar membership as a condition of the practice of law.

Such powers of taxation, so exercised, might well limit the activities of members of the legal profession to the places of their residence. No matter how small the tax per county seat, the burden of reports, of inquisitorial visitations by the recorders forces, of book-keeping and similar other extra legal activities imposed by such an ordinance, would put into effect a law of diminishing returns from extension of business area.

But, a point which perhaps might have been made under our *Proposition No. 1*, we think the ordinance

is invalid not only on reason but because, in its attempt to tax those who merely engage occasionally or casually in the practice of law in Ogden City, maintaining no regular place of business there, the City Commission of Ogden has clearly overstepped any right it might have under the pertinent legislative enactment. It appears obvious to us that when the legislature granted to cities the right to levy a license fee or tax "on any business within the limits of the city" it certainly did not contemplate that the fugitive appearances of lawyers from without the city who maintain no place of business within the City should be subject to such tax.

We know that occupation taxes have been sustained on so-called "transient" businesses, such as those who peddle from door to door as well as those with fixed places of abode such as auctioneers who conduct sales for only short periods, but those so taxed have some locus of business where they carry on their callings, — a store of some sort or a wagon or other vehicle upon the street. There is something to which the license may be affixed, where it may be "kept on conspicuous display," as this ordinance requires, if only the case or box in which the peddler carries his samples. The lawyer has no such place of business when he comes to such city. He may be there to read a record or to talk with a witness or to speak before a court or to try a case pending before the court. His equipment is in his head; he is not there to sell something but to serve some cause.

It appears to us that these considerations are sufficient to condemn this ordinance as overreaching, — through its attempt to brand as taxable such acts as the lawyer may perform as a part of the general exercise of his profession in appearing before the Courts or doing other tasks of an investigatory character in counties or cities other than the location of his office. Certainly the lawyer located at Murray who tries a case in the only places where the Third Judicial District Courts sit is not attempting to “engage in business” in Salt Lake City. He merely performs a function incident to his duties as an officer of the courts of justice which had their inception in that place where his office is located.

In a sense, this question is not new, for a multitude of cases may be found dealing with transient business, such as grazers who rent lands or use a public domain for herding their flocks or the many forms of businesses which men may do in places other than those of their residence. But where such taxes are permitted to be levied upon him who enters the place without intention of permanency of business there is some badge of location, some property brought to be used. Search of the digests and texts has failed to indicate a case where an occupation tax, levied upon the “rendering of some personal service for a consideration,” not accompanied with local possession of property used in a business, or with some location where the business might have a locus given it, has been considered an object of taxation, except by Ogden City,

Ogden City, if it may lawfully tax those maintaining law offices within its limits, otherwise does not lose the right to do so merely because it does not seek to reach practitioners of the law from other cities. See *Evers vs. Mayfield* (Ky.) 85 S. W. 697.

We respectfully submit to the Court that the Alternative Writ of Prohibition issued by the Court in this matter should be made permanent.

Respectfully submitted,

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